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THE  
REPORTS

Of that late  
REVEREND and LEARNED  
JUDGE,  
THOMAS OWEN  
ESQUIRE;

One of the JUSTICES of the  
COMMON PLEAS.

WHEREIN

Are many choice CASES, most of them thoroughly  
argued by the Learned Serjeants, and after argued  
and resolved by the grave JUDGES of those times.

WITH

Many Cases wherein the differences in the Year-books  
are reconciled and explained

---

*With two exact Alphabetical Tables, the one of the Cases, and the other of  
the Principall Matters therein contained.*

---

L O N D O N,

Printed by T.R. for H. Twyford, T. Dring, and J. Place,  
and are to be sold at their Shops in Vine-Court Middle-Temple,  
at the George in Fleetstreet, near Cliffords Inne, and at Furnivals  
Inne-Gate in Holborne, 1656.



THE  
27th March 1842

# REPORTS

Of the late

REVEREND and LEARNED

JUDGE

THOMAS OWEN

ESQ.

One of the JUSTICES of the

COMMON PLEAS

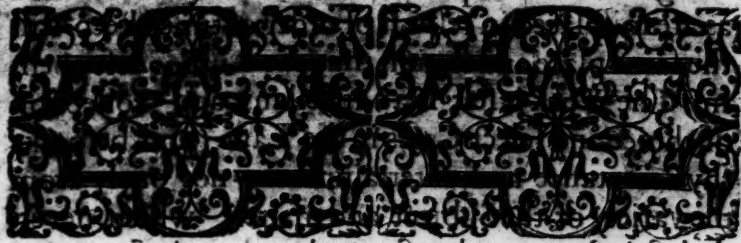
WHEREIN

Are many choice CASES, most of them brought  
argued by the learned Serjeants, and after argument  
and resolved by the Judge in the last term.

WITH

Many Cases wherein the differences in the Year books  
are reconciled and explained.

Printed by T. F. Taylor, T. D. and J. P. Jones,  
and to be had of the Booksellers in York, London, and  
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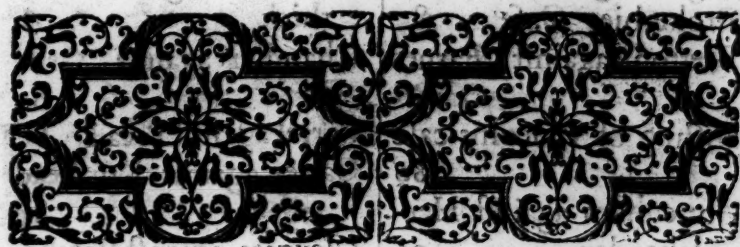
these is to comprehend, that there is scarce any  
 doubt or question, but it **T O T H E**  
 gives light towards the decision and resolution of it:  
 but in the Authority of the **W**ords **R E A D E R.**  
 and Providence, which like a precious Limbeck, derives

**T**His Learned and Reverend Judge, the  
 Author of the Reports following, as  
 he was highly honoured for his pro-  
 found knowledge in the Lawes of this  
 Nation; and upon that account chosen one of the  
 Queens Serjeants at Law, by that Wise Princeesse,  
 Queen Elizabeth: and not long after for his fidelity  
 in that Service, preferred by her to be one of the  
 Judges of the Court of Common Pleas; So he had the  
 happiness to have his Name and Memory perpetua-  
 ted in those Excellent Parts and Abilities of that ac-  
 complisht Gentleman, Sir Roger Owen, his Son and  
 Heire, an Eminent Patriot of his Countrey, who  
 performed the office of a pious and dutifull Son, in  
 Erecting a Monument to the Memory of his worthy  
 Father, in the Abby-Church at Westminster; where  
 you may see a short History of this Reverend Person.  
 There yet remains one Monument more, *Omni are  
 perennius*. These excellent R E P O R T S drawn by his  
 own hand in a Language then in use, and most expe-  
 dititious for that purpose. The paines of an Industrio-  
 us Gentleman hath translated them into another  
 Language, more proper to the Meridian of this Nation;  
 which Work thou shalt find faithfully performed,  
 and so strickly and religiously, that even those very

things that most required alteration, *Viz.* Such Cases as are misplaced in respect of order of time, keep still the same place and station that the Author left them in. The Work it self is a Miscellany and Collection of choice and select Cases in the Law, and bespeaks thy acceptance and entertainment, not only from the variety of the Subject and matter, which nevertheless is so comprehensive, that there is scarce any doubt or question in the Law can be raised, but it gives light towards the decision and resolution of it: but from the Authority of the Authors sage Wisdom and Prudence, which, like a precious Limbeck, derives unto thee the Spirit and Quintessence of those many learned Arguments that were made in these Cases, both at the Bar and Bench. If in naturall Birth and Productions it gives value and esteem to the Issue to be descended from wise and noble Parents, upon that common presumption, that *Robra Parentum filii reserunt.* The consideration should much more take place in the Results and Emanations of the mind and braine, wherein those Tendeys and Tradirions must necessarily be conceived to have the greatest authority, which are most heightened with Experience and Observation. Such are the Reasons of this Reverend Judge, from which I shall no longer detain Thee.

THE





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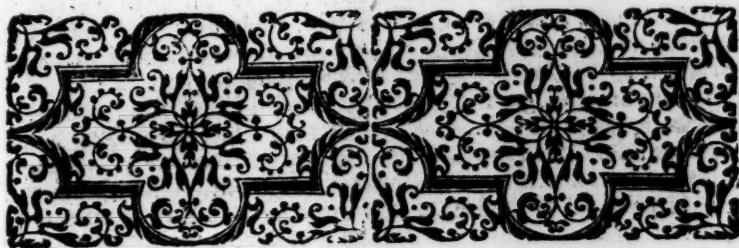
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THE  
REPORTS  
OF  
JUDGE OWEN.

Termino Pasch. anno 26 Eliz.

Leonard *against* Stephens.

Rotulo. 1703.



LEONARD chief Prothonotary, brought an Action of Trespasse against Stephens; who submitted, &c. for that Sir Christopher Heyden Knight, was seised in Fee, and enfeoffed the Defendant, and gave colour to the Plaintiff; The Plaintiff replied, that true it was that Sir Christopher Heydon was so seised, but he being so seised, died seised of the Premises, and that after his death, they did descend to his Son and Heire, who entered and was seised; and being so seised did enfeoff the Plaintiff: Without that, that the said Sir Christopher Heyden did enfeoff the Defendant, whereupon Issue was joyned, and the Jury gave an especiall Verdict to this effect.

That the said Christopher Heyden was seised as aforesaid, and made a Lease for years to the Defendant by Deed, containing these words, *Dedi & concessi & confirmavi* to the Defendant and his Heires, With a Letter of Attorney to make Livery.

The Question was, whether this was a feoffment, or but a Confirmation. Walmsley Serjeant, It is but Confirmation being by Deed, and hath the word Confirmation. Anderson, By that reason he in the Reversion cannot enfeoff his Lessee so many years by Deed as he may without Deed: but I conceive, that it is at the liberty and choice of the



Lessee either to take it as a Feoffment or a Confirmation. Walmley, As soon as the Lessee hath accepted the Deed, by that he hath declared his meaning to have it as a Confirmation. Anderson, And when the Lessee doth accept the Libery, doth not that shew his expresse meaning to take it by the Libery, and shall the Libery signifie nothing?

And in Bracebridges Case, where the Tenant in tail made a Bargain and Sale, and made Libery, and the Deed was inrolled within the six months: this was adjudged to be a Discontinuance, and yet the Bargain and Sale makes no discontinuance, which little differs from the case in question. Walmley, If Tenant in tail be disseised, and it is agreed between the Disseisor and the Disseeisee, that the Disseeisee shall make a Deed to the Disseisor, who makes a Deed accordingly, it is not in the election of the Disseisor to take this as a Feoffment. Anderson, The Cases differed, for the Disseeisee hath no power to make a Feoffment. And adjudged by the Court that it was a good Feoffment. vide 17 Aff. 20. 22 H. 6. 43.

### Scire facias by the Queen against Allen.

**T**he Case was, A man recovers damages in an Action on the case, and he assigns parcell of his debt to the Queen before execution, and the Queen thereupon brought a Scire facias. Manwood chief Baron, and all the Court held cleerly, that parcell, or a Poerty of this debt could not be assigned over to the Queen. See 22 H. 6. 47. where parcell of a debt upon an Obligation was attached by a foreyn Attachment.

### Beverley against the Arch-bishop of Canterbury.

Quare Impedit.

**T**homas Beverley brought a Quare Impedit against John Arch-bishop of Canterbury, and Gabriel Cornwall, the case was, That the Queen being intituled to an Abbotson by Lapse because that the Incumbent had two Benefices, each of them being of the value of eight pounds per annum, whereby the first by the Statute of 21 H. 8. became void, and after the said Incumbent died, and others others were presented by the Patrons, who died also, whereby the Church becomes void againe. If the Queen may now take her turn to present, in regard she took not her turn when the first Lapse happened immediatly at the first avoidance, was the question. And after long and serious debate, all the Iustices of the Common Pleas did resolve.

That the Queen shal not now have her presentment, but the Patron, because the Queen hath such presentment by Lapse as the Bishop had, and no other, and could present but to the present avoidance then void: and although Nullum tempus occurrit Regi, yet we must distinguish it thus, for where the King is limited to a time certaine, or to that which in its self is transitory, there the King must do it within the time limited, or in that time wherein the thing to be done hath essence or consistence, or while it remaineth, for otherwise he shall never do it. For if the Grantee of the next avoidance, or Lessee Per auter vie be attaint,

faint, here the King must take his interest and advantage during the time, viz. during the life of Cestui-que vie, or within the years of the next avoidance, or otherwise he shall never have it: the same Law is where a second presentment is granted to the King, and he does not present, he shall not present after. Shuttleworth, we have an Outlawry against the Plaintiff, whereupon Judgment was stated: But after Hil. 29 Eliz. The Queens Serjeants shewing that the Plaintiff was outlawed; It was argued by Walsley, that that could not now come into debate, for the plaintiff hath no day in Court after judgment, and it is but a surmise that the Plaintiff is the same party. Windham, In a debt upon an Obligation, the Serjeants may pay the debt for the Queen, and yet it is but a surmise.

And the opinion of these Justices was (so) Anderson was absent) that the Writ to the Bishop ought to be stated; but in what manner proccesse should be made if the Scire facias shall issue against the Plaintiff, they said, they would advise concerning the Course: But Periam said, that a Scire facias might have issued against the ancient Incumbent, and then the Queen shall bring a Scire facias again, because she had no presentation. And the Scire facias was brought against Beverly. Walsley, I conceive the Queen shall have no Presentation, so; although we have acknowledged our Presentment, yet before execution we have but a right; As if a Distessor be outlawed he shall not forfeit the profits of his Land; also he hath brought a Scire facias, and a Scire facias lies not but by him that is party or privy. Periam, After that we have this Chattell, it is forfeit by Outlawry. Anderson, The Judgment that he shall recover, shall not remove the Incumbent, and then the Plaintiff hath but a right; to which Periam and Walsley agreed: but as to the other point, that the Queen shall not have a Scire facias for default of privy, they saw no reason; so; in many Cases she shall have a Scire facias upon a Record between Strangers: Anderson, If I recover in debt and then I am outlawed, shall the Queen have this debt? Walsley, If I recover in a Quare Impedit, and dye, who shall have the Presentment my Executors or my Heirs? To which no answer was made: But the Court would take advice for the rareness of the Case. And it was said to Walsley that he might demur in Law, if he thought the matter insufficient, to which Walsley agreed, and did demur, &c.

**A**n Annuity is granted to a woman for life, who after marries, the Arrears of the Annuity incur, and the wife dies, whereby the Annuity is determined. It was adjudged that the husband shall have an Action of Debt at the Common Law: so; that an Annuity is more then a Chose in Action, and may be granted over. And it was agreed by the Court in this case; That if a man grant an annuall Rent out of Land in which he hath no interest, yet this is a good Annuity to charge the person of the Grantor in a Writ of Annuity, 14 H.4. 29 A. Coke 4th Rep. 51. A.

Annuity to a woman who marries and dies.

## Bragg against Brooke.

Second deli-  
verance.

**L**ucas Bragg brought a writ of second deliverance against Robert Brook, for taking his Cattell in a place called East Burlish in the County of Surrey, the Case was.

That Sir Thomas Speck was seised of a Mannor, containing in it severall Copyholds, and the place where, &c. was Copyhold. And the said Sir Thomas being so seised, married, and then died, and the wife 5. Edw. 6. demands the third part of the Mannor for her Dower. Per homen centum Messuagium centum gardinum, tot. acr. terræ, prati, &c. And the wife had Judgment to recover; and the Sheriff assigned to her part of the Demesnes and parcell of the Services and of the Freeholders and Copyholders. And it was resolved clearly that the Copyholds did not passe by the assignment; and that she could not grant a Copyhold, for when she demanded her Dower it was at her election and liberty, to demand either a third part of the Mannor, or of the Messuages, and when she demanded Per homen Messuagiorum, &c. she cannot then have the Mannor, nor can a Mannor be claimed unless by his name of Corporation, as Anderson termed it, and not otherwise. And the Lands and Acres cannot be called Mannors, and then the grant of a Copyhold by one who hath no Mannor cannot be good. And so was the opinion of the Court, and yet the Sheriff had assigned to her Demesnes and Services, and all things which make a Mannor. And 29 Ed. 3. 35. If a Mannor to which an Advowson is appendant be delivered by the Sheriff in execution by the name of a Mannor, cum pertinentiis, the Advowson passeth also; but it is otherwise if it be delivered in extent, by the name of Acres, Lands, Meadow, Wood, &c.

## Wakefeilds Case, 28 Eliz.

Rotulo 607.

Replevin.

**W**akefeild brought a Replevin against Cassand, who advowd for Damage-feasant: And the Plaintiff prescribed that D. is an ancient Town, &c. and that all the Inhabitants within the said Town (except the Parson, Infants, and some particular houses) have used to have Common to their houses, &c. The Advowant shewed that the house to which Common was claimed, was built within thirty years last past. And whether he shall have Common to this new erected house was the question on a Demurrer:

Shuttleworth, he shall have this Common by prescription, but not of common right. Gawdy, the Prescription is against common reason that he should have Common time out of mind, &c. to that which hath not been thirty years, and he hath excepted the Parson, Infants, and such particular houses, and by the same reason may except all, and therefore it is not good. But it was adjudged no good Prescription, for if this be a good Prescription, then any body may create a new house, so that in long space of time there will be no Common for the ancient Inhabitants. Periam, By such Prescription the Lord shall be barred to impropriate the Common, which is against reason. Anderson, The Common is intire, for if H. hath Common appendant to three Messuages, and enfeoff one of one Messuage, another of the second, and another



Bishop of Lincolns  
Case.

5

another of the third, the Common in this case is gone: But all agreed that it is impossible to have a Common thus out of mind, &c. for a house that is builded within the thirty years.

Mich. 29, and 30 Eliz. Rot. 2299.

Bishop of Lincolns Case.

**T**he Queen brought a Quare Impedit against the Bishop of Lincoln, and Thomas Leigh, to present to the Church of Chassenut Saint Giles in the County of Bucks. The case was thus; H. being qualified took two Benefices which were above the value of eight pounds, and after took a third Benefice above the said value, whereby the first Benefice became void, and so remained for two years, whereby Title of Lapse accrued to the Queen, and (before presentment made by the Queen) the Patron did present one A. who being admitted, instituted, and inducted, did refuse to pay 3*l.* 2*s.* 0*d.* due to the Queen for the Tenths, which matter was certified by the Bishop into the Exchequer, whereupon and by force of the Statute of the 26 H. 8. the Church is ipso facto void; wherefore the Bishop the now Defendant being Patron in right of his Bishoprick, did present Thomas Leigh the other Defendant, against whom the Queen brought her Quare Impedit: And it was adjudged by the Court that the Quare Impedit very well lies; for the Recusancy to pay the Tenths was his own act, and is a Resignation, and by that reason the Church is void, and this shall not hinder the Queen of the Lapse: But if A. the Incumbent who was presented, dies, being presented by usurpation upon the Lapse to the Queen, yet afterwards the right Patron shall present again: But when A. the Incumbent doth resign and make the Church void by his own Act, viz. by Recusancy, as in this case is done, this may be done by Collation, and by such means the Queen may be deprived of her Title by Lapse: for is this Collation between the Bishop and the Incumbent be suffered, then may a stranger present upon the Title of the Queen, and presently such Recusancy and Certificate may be made, by which the Church shall become void, and so the Queen deprived of the Lapse. Fenner, this Lapse is given to the Queen by her Prerogative, but on condition that she take it in due time, for such is the nature of the thing Lapsed, as is in this case adjudged, viz. That when the Queen hath Title to present by Lapse, and doth not present, but the Patron presents, and after the Church becomes void by the death of the Incumbent: In this case (adjudged by the Court also) the Queen cannot present; but in this case, the avoidance being by resignation and not by death, Judgment was entered for the Queen.

Quare Impedit.

C

Trin.

Trin. 19 Eliz. in Com. B.

Hales Case.

Debt on a  
Bond.

**S**amuel Hales brought an Action of Debt on a Bond against Edward Bell, and the Condition of the Bond was, that if the said Bell should pay to the said Hales fifty pounds within forty days next after the return of one Russell into England from the City of Venice beyond the seas, that then the Obligation to be void: and the Defendant pleaded in Bar that the said Russell was not in Venice, upon which the Plaintiff demurred: And adjudged by all the Justices that it was no good plea; for in such cases where parcell is to be done within the Realm, and parcell out of the Realm, the triall shall be within the Realm, 7 H. 7. 9.

Trin. 28 Eliz. in Com. Ban.

Haveringtons Case. 1974.

Debt by an  
Administrator.

**H**averington and his wife as Administratrix of one Isabell Oram, brought an Action of Debt against Rudyand and his wife, Creditrix to one Laurence Kidnelly, the Case appeared to be thus.

Farmer for thirty years did devise to his wife so long as she shall be sole and a Widow, the occupation and profits of his terme: And after her Widowhood, the Residue of the terme in the Lease and his interest in it to Reynald his Son, the Devisor dies, and the wife enters according to the Devise: And afterwards he in the Reversion by Indenture *Dedit & concessit, vendidit & Barganavit totum illud rementum suum*, to the wife and her Heires, and did also covenant to make further assurance, and to discharge the said Tenement of all former Bargains, Sales, Rights, Joyntures, Dowers, Mortgages, Statute-merchants, and of the Staple, Intrusions, Forfeitures, Condemnations, Executions, Arrearages of Rents; and of all other charges (except Rents Services which shall be hereafter due to the Lords Paramount) And then the Reversioner and his wife levied a Fine to the uses aforesaid; and after the Devisee takes husband, and thereupon the Son enters in the terme. And the Administrator of the wife brought an action of debt upon an Obligation, for the performance of the Covenants of the Indenture against the Administrator of the Reversioner: And Judgment for the Plaintiff.

And it appeared by the Record that these points following were adjudged to be Law, although that the latter matter was onely argued.

1. That the wife of the Reversioner who had Title of Dower in the Land, is concluded of her right of Dower, by the Declaration of the uses of the Fine by the husband onely, which Fine is after levied by them joyntly, because no contradiction of the woman appears that she doth not agree to the Uses which the husband solely by his Deed of Indenture had declared.

2. To Devise that the wife shall have the occupation and profits during

ring her Widowhood is a good Deviser of the Land it self, during such time. See Plow. 514. And that no Act which they can do in purchasing the Inheritance by which the Terme is extinct, shall bar the possibility by which Reynald the Son hath to come, upon the womans marriage.

3. That a Lessee for years being in possession may take a Feoffment although it be by Deed, and may take Liberty after the delivery of the Deed, and shall be deemed to be in by force of the Feoffment, as in this case is pleaded, although that the Lessee may take the Deed by way of confirmation, and then the Liberty is but Surplusage and void.

4. It was resolved, that this possibility which was in Reynald the Son to have the residue of the terme upon the inter-marriage, which at the time of the Feoffment and of the Fine, was but Dormant, shall be accounted a former charge and before the Covenant, because of the will which was before the Covenant, and shall awake, and have relation before the marriage. As if Tenant in tail of a Rent, purchaseth the Land out of which the Rent issueth, and makes a Feoffment, and covenants that the Land at that time is discharged of all former charges, although this charge is not in esse, but is in suspense, as it is said 3 H. 7. 12. yet if the Tenant in tail dye, his Issue may distrain for this Rent, and then is the Covenant broke, for now it shall be accounted a former charge before the Feoffment.

Mich. 29, and 30 Eliz. in Com. Ban.

Bretts Case.

Brett brought an action of Debt on a Bond against Averden, and the Condition of the Bond was to stand to the Arbitrement of J.S. who did award that the Defendant should pay ten pounds to Brett, and no time was limited to pay it. The Defendant confesseth the Arbitrement but pleaded in Bar that the Plaintiff hath not required him to pay the money: And the Plaintiff hereupon demurred. Adjudged by the Court, that it is no good plea, for the Defendant at his perill ought to pay the money, and the Plaintiff need not make any request. Wherefore Judgment was given for the Plaintiff.

Debt on a Bond,

Trin. 29 Eliz. in Com. Ban.

Bucknells Case.

Bucknell was robbed in a Hundred within the County of Bucks. and thereupon brought his Action upon the Statute of Winchester, because the Theeves were not taken: And Not guilty being pleaded by the Inhabitants, the Jury gave this speciall Verdict, viz. That he was robbed the same day alledged in the Declaration, but in another place and within another Parish then that he hath alledged in the Declaration, but that both the Parishes were within the said Hundred: Upon which they prayed the Judgment of the Court whether the Inhabitants were guilty. Adjudged by the Court for the Plaintiff, for it is not materiall in what Parish he was robbed, so it were within the same Hundred.

Action for Robbery on the Statute of Winchester.

Hill.



Hil. 30 Eliz. in Com. Banc. Rot. 904.

Spittles Cafe.

Replevin.

**S**pitte brought a Replevin against Davis, the Cafe was this. Turk being seised of Land in Fee, did devise parcell thereof to his youngest Son. Proviso, and it is his intent, that if any of his Sons, or any of their Issues, shall alien or demise any of the said Lands devised, before they shall attain the age of thirty years, that then the other shall have the Estate, and does not limit any Estate: And then the eldest Son made a Lease before his age of thirty years; and the youngest Son enters, and afterwards, and before the age of thirty years he aliens the Land he entred into by reason of the limitation: the elder Brother re-enters, and demised to Spittle the Plaintiff for three years, who put a Waste into the ground, and Davis by the commandment of the younger brother entred and took the Waste Damage-feasant; and Spittle brought a Replevin. And upon the whole matter there was a Re-mainder: It was resolved.

1. That this is a limitation, and that the Estate shall be to such use as by the Will is directed untill there be an Alienation, and upon Alienation the Land shall go to the other Brother.

2. When the youngest Brother hath once entred for the Alienation, then is the Land discharged of all Limitations, for otherwise the Land shall go and come to one and the other upon every Alienation ad infinitum, wherefore all the Judges agreed, that after the one Brother hath entred by reason of the limitation, the Land is then for ever discharged of the Limitation made by the Will: And Judgment was given accordingly.

Michaells Cafe.

**T**homas Michaell brought an Action of Debt on a Bond against Stockworth and Andrews; the Jury gave this speciall Verdict: That the said Stockworth and Andrews did seale a Bond and delivered it to the Plaintiff as their Deed: and after Issue joyned, and before the Nisi prius the Seale of Andrews was taken from the Bond.

Shuttleworth, The Plaintiff shall be barred, for it is one entire Deed, and the Seale of one is wanting. And admit (in case it goes against us) the Judgment be reversed by writ of Error, the Plaintiff can have no Action on such Bond: But it was adjudged to be a good Bond; and Judgment for the Plaintiff. See the like case in Dyer, Trin. 36 H. 8. 59. A.

Hillari

Dominant

Debt on a Bond.

Debt on a Bond. 120. p. 10.

Hillari 33 Eliz. in Com. Ban. Rot. 1315. *Case Elix. 217. pl. 3. Anderson p. 201.*

## Richmonds Case.

**R**ichmond brought an Action of Debt against Butcher, the case was; Debt for rent,  
A man makes a Lease for years, reserving Rent to him and his  
Executors and Assignes, and during the terme the Lessor dies, and his  
Heire, who hath the Reversion, brings an Action of Debt. And it was  
urged, that the Rent was incident to the Reversion, and the Heire ha-  
ving the Reversion shall have the Rent also as incident to it, as the case  
is in the 27 H. 8. 16. If H. makes a Lease for years, reserving Rent, with-  
out saying any more words, the Heire shall have this part, because it  
shall go along with the Reversion: So in the fifth of Edw. 4. 4. If two  
Joint-tenants make a Lease for years, reserving Rent to one of them,  
yet the other shall have the Rent also, although no mention were made  
of him; so in the 7 H. 4. 223. By the Court, If I make a Feoffment  
in Fee, reserving a Rent to me, my Heires may distraine: And if I  
grant over this Rent, my Assignes in this case may distraine and a-  
void: so in this case an Action will lye for the Heire, although he be  
not mentioned. But adjudged to the contrary by the Court, for when  
H. passeth Lands from himself, the Law gives him liberty to make them  
in such way and manner as he himself will, and this liberty ought to  
take effect according to the expresse words, for the Law will not extend  
the words further, for the intent shall appear by the words, and then  
it cannot be here intended that his will was that his Heires shall have  
the Rent, because the words are not sufficient to give it to his Heires:  
And therefore note a diversity when the Law makes a Tenure, and  
when the party; for if the Law makes a Tenure, the Heires shall have  
the Rent: but otherwise where the party makes it, unless there be ex-  
presse words for the Heire, as in 10 Edw. 4. 19. by Moile, If H. makes  
a Gift in T. and reserves no Rent: yet shall the Donee hold of the Do-  
nor and his Heires, as the Donor holds over; but if he make a Lease  
for yeares, reserving Rent to the Lessor, the Heire shall not have this  
Rent, for it is a Tenure made by the will of the party. So in the Book  
of Assises 86. If a man lets two acres of Land, reserving Rent ten shil-  
lings for one of them to himself by name, without naming his Heires,  
it is adjudged that the Heire shall not have the Rent of this acre. And  
this is resembled to the case of 12 Edw. 2. Where a man made a Lease  
for yeares, reserving Rent to the Lessor and his Assignes, here none shall  
have the Rent but the Lessor, and it is void by his death, for his Assign-  
ee cannot be privy to the Reservation; and the words of the party shall  
not in any case be enlarged, unless there be great inconvenience to  
be avoided: and his intent and will is performed if he himself have the  
Rent. And if a man reserve such Rent to him and his Executors,  
this word Executors is to no purpose, for that the Rent cannot be re-  
served to them, but the Rent shall be extinct by his death: And if he  
reserve the Rent to his Heire, and not to himself he shall not have it, but  
his Heire, for he shall be stopped to claime it, against his own words  
and reservation. And if I make a Lease for years, reserving Rent to  
me during the terme, if I dye without Heire during the terme, the  
Lessor by Escheat shall not have the Rent: which case may be compa-  
red to the case of Warrantie, 6 H. 7. 2. What without mention of the  
Heires



Heires, the Warranty shall not bind them: But if a Rent be reserved to his Assignes, and he grants over the Reversion, here because the Assignes were mentioned in the Reservation, and for that note there is a possibility, the Assignes shall have the Rent, for it shall be intended that when he speaks of Assignes in the Reservation, he profereth thereby to whom he will Assigne the Reservation, wherefore it was adjudged for the Defendant, vide Dyer 2 Eliz. 180, 181. H. bargaines and sells Land; Proviso, that if the Vendor shall pay a hundred pounds to the Vendor his Heires or Assignes, that then the Bargaine and Sale shall be void by two Justices.

The Vendor shall not be made to the Executors, because the Law will not determine to whom the Vendor shall be made, when the parties themselves are expressly agreed.

Mich. 33, and 34 Eliz. in Com. Ban.

### Goddard's Case.

Confirmation  
by the Lessor  
to the Assign-  
ee of Tenant  
for years.

**H** makes a Lease for years of twenty acres, reserving Rent, the Lessor grants all his Estate in one of the acres to I. S. the Lessor confirms the Estate of I. S. Resolved by the Court,

1. That by this confirmation the entire Rent is gone in all the other acres, for being an entire contract and by his own act, there cannot be an occupation for part, and an extinguishment for the other part; and in this case there is no difference between a suspension in part, and an extinguishment. If A. makes a Lease for years of twenty acres, reserving Rent, upon condition that if he does not do such a thing, that then the Lease shall be void for ten acres; if he performs not the condition, and the Lessor enters, the entire rent is gone. And it was resolved that a Lease for years was not within the Statute of Quia emptores terrarum, for that Statute extends to an Estate in Land of Freehold. See the Report of Serjeant Benlowes in 14 H. 7. A Warren did extend into three Parishes. And a Lease was made for years reserving rent, and after the Reversion was granted to another of all the Warren in one of the Parishes, and the Lessee did attorne. The question was, if the Lessor should have any part of this rent during the terme, so that the rent may be apportioned or not. And the Justices said in this Case, that neither the Grantor nor the Grantee shall have any rent, for the Law is, that no Contract shall be apportioned.

2. It was resolved, that no Lessor shall abate for the arrearages of rent, before the time of Confirmation and extinguishment; for H. shall not abate for the rent determined; but he may defend himself by way of Justification. See where a man may justify the taking by speciall evidence, 19 H. 6. 41. by all the Court, except Askew.

Mich.



Mich 33, and 34 Eliz. in Ban. Reg. Rot. 471.

Wardfords Case.

**H**addock brought a Writ of Error against Wardford upon a Judgment given in the Common Pleas; the case was this: Two Coparceners of a house, one of them lets her part to a stranger, and the other lets her part to a stranger also, and then both Leases come to the hands of one H. and then one of the Coparceners bargaines and sells her reversion to the other Coparcener. The Lessee commits Waste Permittendo dictum Messuagium cadere, and the grantee of the Reversion brought an action of Waste. The Errors assigned were,

1. That he brought but one action of Waste, although of severall Demises by severall Lessors, whereas he ought to have two actions of Waste. Godfrey, He cannot have an Assize in other manner then his Grantor might have before the Grant, and when the reversion came to him, it can be in other plight then it was before. Gawdy, There is a diversity when the right is severall, and when the possession is severall, for although the possession be severall, yet if the right be intire, but one action will lay, as appeares F. N. B. fol. 2. Godfrey, There is difference betwixt the Writ of Right in F. N. B. and this action, for there he was never intitled but onely to the action, but in our case the action was once severall, and is like the case in F. N. B. 60. where it is said, that a man may have one action of Waste, and declare upon others Leases, but that is intended where the Leases are made by one person, and he cited the case in 21 H. 7. 39. where it is agreed by all the Justices, that if a man hold two acres of one H. by severall feoffmentes, and dies without Heirs, the Lord shall not have one Writ of Escheat, but ought to have two Writs.

Popham chief Justice did agree with Gawdy, for although that at first the Lessors were intitled to severall Actions, yet by matter ex post facto, the Actions may be united: and said, that H. might have an action of Waste, and severall assignments, and also ex dimissione.

2. Error was assigned, that he had assigned the Waste to be committed in the whole house, whereas he had but part of the house, and Waste may be brought for part of a house.

3. Error was, because the other Coparcener was not joyned with him in the Action. But resolved that it was good enough: And the Justices made this diversity, viz. When both the parties have an equall Estate and Inheritance, and when one of them hath but a particular Estate, as in the 37 H. 8. 13. Lessee for life, and he in the remainder shall joine in an Action of Waste, but where they had equal estate of Inheritance, as two Coparceners, or two Tenants in Common, and one makes a Lease, and the Lessee commits Waste, there the Writ of Waste shall be brought by the Lessee only, for it is not like to a personall injury done upon an Inheritance, for an action of Waste is now in the nature of the realty, although that at the Common Law (before the Statute of Gloucester) there was but a Prohibition, yet the Statute gives the place wasted, and damages; and therefore it is mixt, wherefore both of them shall not joine, and the Writ lites, to his inheritance that made the Lease, vide 22 H. 6. 24. by the Court, and agreeing with this resolution.

4. Error

4. Error was, that the Waste is a permissive Waste, and no such Waste lies between Coparceners. for each of them are bound to contribution and reparation: but the Court would take no notice of this.

5. Error was in the entering Judgment, for Judgment was entered by default, whereupon a Writ of Inquiry of damages issued out to the Sheriff, and the Sheriff went to the place wasted, which he needed not have done. And the Judgment was Quod recuperet locum vastatum per visum Juratorum, which was sought, for the going to the place was Surprisage. But divers Presidents were produced to prove that, that was the course: as Hilar. Rot. 501. between the Earl of Bedford and William Smith, upon a Demurrer, and a Writ of Inquiry of damages, and the Judgment was, Quod recuperet locum vastatum per visum Juratorum, and Trin. 31 H. 8. Rot. 142. and the book of Entries, fol. 620. wherefore Judgment was affirmed.

34 Eliz. in Com. Ban.

Gaytons Case.

Resignation  
of a Benefice.

**R**obert Gayton Parson of the Church of little Eysingham in the County of Norfolk, did by Instrument in writing resign his Benefice befoze Edmund Langdon publick Notary, and others, into the hands of the Bishop, and the resignation was absolute and voluntary, and to the use of Miles Mosse, and Paul Brickback, or either of them: And it was further inserted in the said Instrument of Resignation, Protestation & sub conditione quod si aliqui eorum non admissi fuerant per assensum Episcopi, infra sex menses, quod tunc hac present. resignatio mea vacua & pro nulla habeatur, & nunc prout tunc, & tunc prout nunc: and Cestuy que use, came within the time limited to the Bishop, and did offer to resigne to him, which the Bishop refused to except, &c.

Crooke for the Plaintiff, Forasmuch as the Plaintiff may resigne on Condition as well as a particular Tenant may surrender upon condition: and two Parsons may exchange, and if the estate be executed on the one part, and not on the other, that Parson whose part was not executed may have his Benefice again, as it is adjudged in the 46 Ed. 3. But Coke Solicitor, and Godfrey were on the contrary opinion: For that the Incumbent may not transfer his Benefice to another without presentation, as appears in the recited case of 46 Edw. 3. Also the resignation is not good, and the Condition void, because it is against the nature of a Resignation which must be Absolute, sponte, pure, & simpliciter and is not like to a Condition in Law, as in the said case of Exchange in 46 Edw. 3. for the Law doth annex a condition to it, but a collaterall condition cannot be annexed by the parties themselves: Also this is an Act Judicall to which a condition cannot be annexed, no more than an Ordinary may admit upon condition, or a Judgment be confessed on Condition, which are Judicall Acts.

But admitting the Condition good, yet a new Induction ought to be made by the Ordinary, for the Church became one time void; and is not like to the case in 2 R. 2. Quare Impedit 143. where sentence of deprivation was given, and the sentence presently reversed by Appeal, there need no new Institution, for that the Church was never void. And after in Easter Term, 36 Eliz. upon Arguments

Carters	{	William Bartues	{	Haslewoods	
Cafe.	}	Cafe.	}	Cafe.	13

ments given in writing by the Civilians to the Judges, the Judgment was entred, Quod querens nihil capiat per billam.

Hiliar. 35 Eliz. in the Kings Bench, Rot. 56.

Carters Cafe.

**W**illiam Crow brought an Action on the Cafe against Warham Carter for speaking of these words; The said William is forsworn and perjured in swearing at the common place Bar upon the Deeds which he then had in his hand. Action on the cafe for words.

Harris Serjeant did move in Arrest of Judgment, for that the words shall be construed according to the common and vulgar sense, viz. That he is forsworne upon the Deeds. But the Court was against him: For the vulgar sense is, that men do not use to swear but upon a Book, and the Plaintiff had Judgment.

Hil. 36 Eliz. in the Kings Bench.

William Bartues Cafe.

**W**oodroffe and Cooke brought a Prohibition against Bartue; the Cafe was thus. Prohibition.

The Abbot of Langley did let Land to one Kaston for ninety nine years, who let the same to Woodroff for sixty years, who granted parcell of the said Land to Cooke during the whole terme. And Bartue did libell against them both in the Spirituall Court for Tythes, and they joyned in a Prohibition.

Godfrey, They may not joyne in a Prohibition, for by the Statute of 34 H. 6. 13. If two men are sued in the Court Christian for slander, battery, &c. which are fevorall in themselves, there they cannot joyne in a Prohibition: but where they be sued for the finding of a Lampe, &c. by reason of their Land, there they shall joyne; but in this case the Tythes are fevorall. But it was resolved,

1. That their joyning in the Prohibition was good enough.
2. That the death of one of them shall not abate the Writ of Prohibition, because nothing is by them to be recovered, but they are onely to be discharged of Tythes.

Pasch. 33 Eliz. in the Kings Bench, Rot. 292.

Haslewoods Cafe.

**T**he Lord of a Mannor did advow on the taking of a Gelding as an Error in A-  
 C Grey within his Mannor, and had Judgment to have return and vowry.  
 damage to twenty pounds: And hereupon a writ of Error was brought, and adjudged that no Damages shall be had in such case: For the A.  
 C bowant



bowant cannot recover damages at the Common Law, and by the Statute of the 7 H.8. and 4. no damages shall be given to the Abbotant for Damage-feasant; but where he abotves for Kents, Customes, or Services, and this is neither Kent, Custome, or Service, for that of common right the Estrey belongs to the King, and no common person may have it unless by grant, or by prescription, and the Statute is to be taken strictly: for the Abbotant for Damage-feasant, or for Kent Charge should not recover Damage by this Statute, before the Statute of 21 H.8. 19. where the Plaintiff hath remedy, as it is holden in Dyer 141. B. But because divers Presidents were shewn out of the Common Pleas from time to time since the making that Statute, that damages shall be recovered by the Abbotant, who abotves for Amercements, &c. it was said, that it would be very difficult to controll so many Presidents.

Gawdy, no great credit is to be given to such Presidents as passe sub silentio, without any exception taken to them. Another Error was assigned, because the Judgment was to have return averiorum predictorum, whereas there was but one Gelding: wherefore Judgment was reversed, and the Roll markt.

Trin. 36 Eliz. in B. R.

Fulgeambs Case.

Trespasse against the Constables of Cambridge.

**F**ulgeambe brought an Action of Trespasse against the Constables of Cambridge; the Case was.

The Plaintiffs horses estrayed into Cambridgeshire, and were thereupon Impounded in Cambridge, and then one A. came with a Commission from the Lord Dunsdon Captaine of Bartwick, to take Horses to ride to Bartwick, and the Constables delivered to him the Plaintiffs Horses, and then one of the Horses died.

And the opinion of all the Justices was, that the Action did well lye, for the Constables cannot take Horses out of the Pound to deliver them to any by vertue of such a Commission.

Trin. 36 Eliz. in B. R.

Tauntons Case.

Lease on condition.

**C**oles made a Lease to Taunton for ninety nine years, on condition that if he demised in other manner, then in such manner as he let the same to him, that then it should be lawfull for him to re-enter; the Lessee devised it by his Will to his youngest Son. Resolved, that Rigore Juris, this is a breach of the Condition: for a Devise is an Alienation, as is holden 31 H.8 Dyer 6. and although Conditions shall be taken strictly, yet not directly against the intent of the parties, and the reasonable disposition of the words; and therefore a Devise shall be intended to be within this word, Demise; yet it was said, that it was very hard according to equity that the Estate should be lost: For he intended

tended by this Will to prefer one of his youngest Children, and not to break the Condition, and thought not it was any breach of the condition, and for this cause some doubt was made of the Case, but Hil. 38 Eliz. Judgment was given as aforesaid.

Paſch. 36 Eliz. in B. R. Rot. 41.

Leighs Case.

**T**he Queen being seized of lands as Dutcheſſe of Lancaſter, did make a Leaſe thereof to the Plaintiff, the Leſſee is outed by A. the Plaintiff makes a Leaſe to B. for years, and B. being outed brought an Ejectione firmæ. Ejectione.

1. It was reſolved, that the Queen as Dutcheſſe of Lancaſter cannot be diſſeiſed, for although ſhe be not ſeiſed in jure Coronæ, yet is it in ſeiſin of the Queen, and cannot be taken away from her in reſpect of her perſon.

2. Gawdy, and Fenner held that the Leſſee being outed, the terme is turned into a Right, and therefore it hath been adjudged that an Ejectione will lye: as the caſe is in Dyer 29 H.8. If Tenant in taile, the reversion in the King ſuffers a Reversion, although this ſhall not be to the prejudice of the Kings Reversion, yet ſhall it bar the Eſtate-tail. So if a Parſon makes a Leaſe for years, and the Patron and Ordinary confirms it, and the Parſon dies, and during the Vacation the Leſſee is outed, he is hereby outed of his terme, yet is not the Frank-tene-ment touched.

Clench on the contrary, That he who is outed hath an Eſtate but at ſufferance, for he cannot have an Eſtate for years without a Leaſe, and it is agreed he ſhall not have an Eſtate of freehold by reaſon of the Reversion in the Queen, and the poſſeſſion of the Leſſor, ſhall maintain the poſſeſſion of the Leſſee, as well as the poſſeſſion of the Leſſor ſhall keep the freehold of the Leſſor: and if he have but an Eſtate at ſufferance, then cannot the Leaſe to B. be good: For if Tenant at ſufferance of a common perſon makes a Leaſe for years, this is a Diſſeiſin.

And Popham was of opinion with Gawdy and Fenner, wherefore Judgment was given for the Plaintiff.

I have ſeen a Report 24 Eliz. in the Kings Bench, upon a Demurrer between Edmund Frough and Henry Dire, where the better opinion was, That if one enters on the terme of the Queen, he ſhall not thereby gaine any poſſeſſion; but notwithstanding the Termor may grant over his Terme: but it was agreed that he ſhall have an *Ejectione firmæ*: for by Blowden an Aſſiſe will lye of a Mill, where the water is divers, for the poſſeſſion of the Mill continues in him. But the Juſtices doubted whether it was an Ejectione, wherefore the parties did compound. In the 4<sup>th</sup> 6. Intruſion. If Leſſee for life, the Remainder in the King be outed, he ſhall have an Aſſiſe.

Trin. 36 Eliz. in C.B. Rot. 134.

## Thurstons Case.

Ejectment.

**G**Offe brought an Ejectment against Thurston, the Case was this. The Abbot of Kingstowld in Wiltshire, being seised of Land in the 28th year of H. 8. did (with consent of the Covent) make a Lease for years by Deed indented, and then the Abby came into the hands of H. 8. and from him to Edw. 6. and from him to the present Queen.

And it was pleaded that the Defendant hath the Lease, and that Henry Thinnie did intrude on the Defendant, and made a Lease to the Plaintiff, who being ejected by the Defendant brought this Action, and on this matter the parties demurred.

1. It was said that the Plaintiff cannot bring this Action, inasmuch as Henry Thinnie by his entry on Lessee for years, the Reversion being in the Queen cannot gaine any possession, so that nothing passeth by his Lease to the Plaintiff. But the Court was against this, for he is a sufficient Lessee to maintain an Action of Ejectment: And it was adjudged in the Erchequer Chamber, that the Queens Lessee for years being outed may have an Ejectione firmæ, which proves that he is put out of possession of his terme; and this very point was in a manner agreed the last terme, in the case of Norris.

Fenner, J. H. enters on the possession of the Queen, and makes a Lease for years, nothing doth passe, and the Lessee cannot maintain an Ejectione firmæ, for he gains no possession at all: but it is on the contrary here when he enters on the Queens Lessee.

Gawdy, That is no difference, for the Lessee for years of an Intruder shall maintain an Ejectione firmæ: And I have seen a Report 34 Eliz. between Badinton and Hawle in the Kings Bench, adjudged, that if the Queens Copyholder be outed, and a Lease be made for years by the Intruder, this Lessee shall not have an Ejectment if he be outed, but he shall have an Action of Trespasse against any stranger.

The second exception was taken to the pleading, because the Defendant pleaded in que estare del Lessee del Abbe, without shewing how he came to the Estate. And by the Court a good exception, for he shall be compelled to shew how he came to an Estate in the terme, inasmuch as it cannot be by any means, vide 1. & 2 Eliz. Dyer 171. that a Que Estate of a particular Estate of a terme is not good, and 7 Eliz. Dyer 238. where the Plea was of a que Estate of a Terme, and exception taken to it; and the difference between it and a freehold, so in the 7 H. 6. 440. it was agreed that H. could not convey an Interest by a que Estate of a particular Estate, as Intail for life, or years, without shewing how he came by the Estate, be it on the part of the Plaintiff or the Defendant.

The third exception was, that the Defendant pleaded a Lease made by the Abbot and Covent by Indenture as it ought to be, without saying *Hic in curia prolat.* which exception was also clearly allowed by the Court, for he is privy to it, and therefore he ought to shew it. And for these two exceptions, but especially for the former. Judgment was given for the Plaintiff.

Mich.



Mich. 36, and 37 Eliz. in C.B.

Palmer's Case.

**P**almer an utter Barrester of Lincolns-Inn, brought an Action on the Case against Boyer for these words; Palmer being Steward to I. S. the Defendant in discourse had with I. S. said; I marvel you will have such a paltry Lawyer for your Steward, for he hath as much Law as a Jack a Napes: And the Plaintiff shewed all the matter in the Declaration, and that by reason of such words he was displaced of his Office.

Action on the case for words.

Williams Serjeant did move, in that the words were not, That he hath no more Law then, &c. for then those words were actionable, but, that he hath as much Law as, &c. for which words no Action will lie. But resolved by the Court that the Action will lie, for the words are slanderous and prejudicial to his credit, and by reason of them he was discharged of his Stewardship, also an Action will lie for saying, That he hath as much Law as a Jack an Apes, or my Horse, because they are unreasonable creatures, but if he had said, that he hath no more Law then I. S. that is not actionable, although I. S. be no Lawyer. And Judgment was given for the Plaintiff.

Pasch. 35 Eliz. in B. R.

Audley's Case.

**A**udan brought an Action of Debt on an Obligation made by the Father of the Defendant, in which Writ the Defendant was named Heir and Heir apparent of the Obligor, & Judgment was given against the Defendant, whereupon he brought a Writ of Error, for the Writ does imply that his Father was living, for he is his Heir in truth and in fact, if his Father be dead, and not apparent: To which was answered, that that was but Surplusage which shall not abate the Writ, as appears by the Book of the 10 Edw. 3. But the Court held that Judgment should be reversed, for he ought to be named Heir, as in debt against Executors, he shall be named Executors. And Judgment was reversed.

Trin. 36 Eliz. in B. R.

Downingham's Case.

**T**he Defendant in an Ejectione firmæ pleaded that the Lord of the Mannor did enter into the Land of a Coppyholder by reason of forfeiture for Waste committed in suffering the houses to be uncovered, by which the timber is become rotten, and did not alledge in fact that the Customs of the Mannor is, that such Waste is a forfeiture, for it was said, that although other Waste by the Common Law is a forfeiture,

Ejectione.

Wisdomes?  
Case.

Palmer's  
Case.

ture, yet this permissive Waste is not. Sed non allocatur: for all Waste done by a Copyholder is forfeitable.

2. It was resolved, that if a Copyholder made a Lease for yeares which is not according to the Custome of the Mannor, yet this Lease is good; so that the Lessee may maintain an Ejectione firmæ, for between he Lessee and the Lessee, and all other, except the Lord of the Mannor, the Lease is good, and so hath it been severall times adjudged in this Court.

Trin. 36 Eliz. in B. R.

Wisdomes Case.

Action on the  
case for  
words.

Such brought an Action on the Case for slanderous words against Wisdomes, the words were, There is many a truer and honeste man hanged, and that there was a Robbery committed whereof he thought him to be one, and that he thought him to be a Horse-stealer.

And it was moved in Arrest of Judgment that these words were not actionable; for it is not said in fact, that he was in the Robbery, or that he was a horse-stealer in fact, but onely by imagination, that he thought he was such a one: but Judgment was given for the Plaintiff.

Trin. 36 Eliz. in B. R. Rot. 815.

Palmer's Case.

Christopher Palmer brought an Ejectione firmæ against John Humphrey, and declared that one George Hanger the eighteenth day of May, in the six and thirtieth year of Eliz. by his Indenture did demise unto him a certain peece of Land called the great Ashbrooke, and other peece of Land called Stocking, and also others other peeces of Land naming the peeces, and of one Garden called Muchins Gardein, and of another peece of Meadow called Michins Meade, and of seven acres of arable Land, for the terme of five yeares: by vertue whereof the said Christopher entred, untill the Defendant by force and armes, &c. did eject him, and did set forth in his Declaration that the Defendant ejected him out of the said peeces of Land, and yet did not expresse the contents thereof in certaintie: And upon not-guilty pleaded it was found for the Plaintiff, and for the seven arable acres of Land and the Garden, the Court gave their Judgment that it was certain enough, but as to the other peeces of land, the Court was divided: For Popham & Gawdy held that it was certain enough being in an Ejectione firmæ, which is but in the nature of an Action of Trespasse, and the damages are the principall, and a man may bring an Action of Trespasse for a peece of land, without any other certaintie: But Clench and Fenner were on the contrary, for he ought to set forth his terme in the land, and then to shew the contents thereof, as well in an Ejectment, as in a Precipe quod reddat, by which land is demanded, and a man shall have an Ejectione firmæ de una visgata terræ, but shall not have a Precipe quod

quod reddat of one portion of land, by Skeene and Hill, 7 H.4.40. 9 H. 6. 3. 5 H.7.9. And afterwards vide Mich. 37. & 38 Eliz. It was adjudged that this was good enough in an Ejectione firmæ, for there the damages are the principall; but otherwise in a Precipe, for there ought to be a certainty; but in an Assise of Novel Disseisin it is good enough, but afterwards Mich. 38, & 39 Eliz. the case was debated in the Exchequer Chamber by Writ of Error, and the Judgment was reversed.

## Hil. 36 Eliz. in B. R. Rot. 34.

## Walters Case.

**I**ove brought an Action of Debt against Wotton, who pleaded the Statute of Writ in Bar, and by reason of this Pleader, it was awarded by the Court, that the parties should plead De novo, and this Award was entered in this manner, viz. Et quia placitum illud in modo & forma placitæ est sufficiens in lege, the Court awarded that the parties should replead; and hereupon they pleaded, and Judgment for the Plaintiff: and the Defendant brought a Writ of Error in the Exchequer Chamber, which was certified accordingly.

And there Gawdy moved that the Record in this point might be amended, and to have the Record certified de novo into the Exchequer Chamber; for that the first Award is repugnant in it self, for it is awarded that they shall replead, because the Plea est sufficiens; whereas it might be that they shall replead, because est minus sufficiens, as the paper books are, and the opinion of the Court was that it could not be amended, because that the fault is in the Judgment it self, which is the act of the Court, and therefore cannot be amended.

Glanvill, It is no Error in the Judgment, for the Judgment is only that they shall replead, but the Error is in the Judgment to the Judgment, and may be well amended, and of the same opinion was Popham.

## Mich. 36, and 37 Eliz. in B. R. Rot. 579.

## Bartwrights Case

**B**artwright brought an Action of Debt upon a Bond against Harris, the Condition was, that if the Defendant did acquit, discharge, and save harmless the Plaintiff against an Obligation, in which he and the Defendant were bound to I. S. in 601 l. that then the Obligation should be void. The Defendant said, that Bartwright was sued on this Obligation by I. S. and upon default I. S. had Judgment to recover, and that the Defendant before execution did deliver to the Plaintiff the 601 l. and hereupon the Plaintiff demurred.

Humbert, It is no plea, for he confesseth that the Plaintiff was not yet taken in execution, yet inasmuch as he may be taken, therefore his body, goods, and lands are liable to the execution, and he hath not acquitted nor saved him harmless against the Bond of I. S. vide Dyer 186. And the Plaintiff had Judgment, &c.

Greys



Mich. 36, and 37 Eliz. in B.R. Rot. 25.

### Greyes Cafe.

3. Cro. 372. 1. Inst. 8. a. **K**ey brought an action of Trespasse against Bartholmew; the Cafe was: A man did purchase divers Fishes, viz. Carpes, Tenches, Trouts, &c. and put them into his Pond for store, and then died.

The question was, whether the Heire of the Executors should have the Fish.

Popham, The Heire shall have the Deer in the Park, and by the same reason, the Fish.

Clench, If the Fish be stolne it is Felony, so that it appears there is a property in them, vide 18 Ed. 4. 10 Ed. 4. 14. 22 Ass. 98. that stealing of Tench out of a Pool is Felony, by which it seems they are but Chattels.

Popham, the Book is so, and so is the Law, but that is of stealing Fish out of a Trunk, or some narrow place where they are put to be taken at will and pleasure; but otherwise it is where they are put into a Pond.

Fenner, He which hath the water shall have the Fish: And Popham ex assensu curie gave Judgment for the Heire. And in the principall case the Executors did take the Fish with Nets, and the Heire brought a Trespasse and adjudged maintainable. See what Chattels Executors shall have, and what not, in 21 H. 7. 26, 10 H. 7. 6. & 30. an account will lye for Fish in a Fish-pond; so in the 5 R. 2. Waste 97. an Action of waste did lye against a Guardian in Chivalry for taking Fish out of a Pool by the Statute of Magna Charta, but quære if it lyes against a Termor, or Guardian in Dorage upon an Account for Fish.

36 Eliz. in B. R. Rot. 767.

### Leighs Cafe.

**L**eigh brought an Ejectione firmæ for a Chamber against Shaw, the Cafe was; A Lease was made of the Rectory of Chingford in Essex, and of the Glebe, excepting the Parsonage house, saving and allowing to the Lessee a Chamber over the Parlor next the Church.

It was adjudged that the Lease of the Chamber was good, for as well as a man by his exception may except part of a thing, so as it shall be intended that it was never let or granted; so in this case when he sales, except the Parsonage house, saving and allowing to the Lessee a Chamber, this saving makes the Chamber, as it were excepted out of it, as if it had been leased; so a saving out of a saving, so as much as there had been no saving at all, and then this Chamber not being excepted out of the Lease shall passe clearly by the Lease of the Rectory. And Judgment was given for the Plaintiff.

37 Eliz. in B. R. Rot. 242.

Wrights Case.

**W**Right brought a Writ of Error against the Mayor and Community of Wickombe, to reverse a fine levied by his Ancestors of twenty acres of Land, the Defendants in abatement of the Writ of Error did plead that the Plaintiff after the death of his Ancestors did disseise the Defendants of the Land, and made a feoffment to a stranger. Judgment, &c. The Plaintiff replied, that they did re-enter upon him, without that, that he did enfeoff a stranger modo & forma. The Jury found, that there was a fine of twenty acres, and that the Plaintiff being Disseisor of all, made a feoffment of six of the acres to a stranger. Et si supra totam materiam, &c. And it was objected that the Record was intire, and the Error is a Chose in Action, and not a Chose in Droit, and therefore cannot be divided, but if it were a Chose in Droit, it is otherwise, as if a Disseisor of twenty acres releaseth all his right in five acres, this doth extinguish all his right in the five acres: so upon a feoffment of parcell, yet the right remaineth as to the remnant: But of a Chose in Action which is meerly entire, no apportionment can be, as in the 31 Eliz. in the Kings Bench, between Charnock and Wrothesley, the case was; Husband and Wife levied a Fine of the Wives Land, and after because the Wife was within age, they sued a Writ of Error to reverse the Fine. The question was, If this should be reversed as to the Wife onely, or against the Husband according to the opinion of Belknap in the 30 Ed. 3. And after long debate it was resolved that it should be against both, for it is intire, and cannot be affirmed in part and disaffirmed in another part. And the Lord Norris case is very agreeable to this, where Tenant for life did levy an erroneous fine, and then was attaint by Parliament, and all the right which he had to any Land was given to the Queen; and it was adjudged that there is no title of Error, nor was it given to the Queen by this word, Right, and then if it be so, the Title of Error is not of any right in the land, but onely to the Suit, and if it be a Suit, it is a Suit intire, for he cannot have severall Suits, as is agreed in Sir Richard Knightleys case. A man had judgment to recover 150 l. and did release 20 l. of it, and after sued execution, and the other brought an Audita querela upon the Release, and defeated all the execution. But it is otherwise where such apportionment of such Suit is done by act in Law, as in 7 Ed. 4. fol. ultimo. The Sheriff levied parcell of the debt by Fieri facias, yet shall he have an Action of Debt for the Residue upon the Record: But in this case it is the act of the party himself that deströtes his Suit for part of the Land, for which it shall destroy the other suit, for the Error is intire as to all the land and cannot be divided, as in the 38 Ed. 3. and 12 H. 6. if a false Verdict be found, and the party grieved does make a feoffment of parcell, he shall not have an attaint for any part: So in the 19 H. 6. and the 39 Ass. If he who hath cause to bring a Writ of Error or Attaint, does take a Lease for years of parcell, he doth suspend his Action, and if he takes in fee, it is quite gone. But it was resolved by the Court that the feoffment does not deströte the Title of the Writ of Error, for more then so much as a feoffment was made of; and thereupon they first took a difference between

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between suspension and extinguishment of an Action, for peradventure if he suspend his Action as to any part for any time, this is a suspension unto all, but extinguishment of part; is a Bar to that part onely; and Gawdy cited the case in 9 H.6. where Judgment was reversed for part only, and it is not unusual to have a fine reversed for part: as if a fine be levied of lands in ancient Demesne, 47 Ed. 3.9. a. there by Parsley, If there be Error in Law as to one parcell, and Error in Fact as to another parcell, the Judgment as touching the matter of Law may be reversed.

Fenner, He who hath Title to reverse a Fine, or recovery by Writ of Error, hath right in the Land, and if he release all his right in the land, the Error is exting, and the reason of the Lord Norris Case was not that the Title to the Error was an Action in p'son annexed to the party to the Record and his Heires, and cannot be transferred over to another, no more then a Writ of partition between Coparceners, s; a Nuper obiit.

Popham, He who hath Title to have the Writ of Error hath no Title to the Land, although that thereby he be to be restored to the Land: for if the Land descend to one who hath Title to have the Writ of Error, without doubt it shall not be accounted a remitter: But as to the matter now in question, he said, that if two men bring a Writ of Error in the Realty, and the Tenant plead the release of one, this is a good Bar against both, because the Error in the Record is released: But if one who hath Title to a Writ of Error, does make a Release of all his Right in one acre, this is a Bar but for so much, inasmuch as the Release is a Bar but as to the Restitution of the Land onely, and no Release of Error in the Record, for by the Reversall of a Fine or Recovery, the party may annihilate the Record, and have Restitution of that which the Record before took from him, and therefore it shall bar the Plaintiff. And the opinion of all the Court was, that the Fine should be reversed for that part of the Land onely, whereof no feoffment was made, but for some defects in the Writ of Error, Judgment was stayed.

Mich. 37, and 38 Eliz. in B. R.

### barnards Case.

S Mich brought an Action of Debt upon a Bond against Barnard, the Defendant pleaded that the Plaintiff was outlawed, and a day was given him to bring in the Record, at which day he made default.

Daniel moved that the Judgment for the Plaintiff in this case should be that the Defendant should answer, for that the plea of Outlawry was but a dilatory Plea, and no Plea in Bar, as appears 21 Ed. 4. 15. but this difference was taken by the Court. In an Action of Debt upon a Bond, Outlawry of the Plaintiff is a Plea in Bar, and the reason is, because all the Debts in specialties are forfeited to the Queen by reason of the Outlawry, and because the Queen is to have them, it is a good Plea in Bar: But in a Trespass or Debt upon a Contract, the Outlawry is but to the abatement of the Writ, and the Queen shall not have Debts upon simple Contracts, but after the Outlawry pardoned, the Plaintiff may have an Action for them again. And because he

failed



failed to bring the Record at his day appointed, the Plaintiff recovered, vide Dyer 6 Eliz. 227, 228.

Hil. 32 Eliz. in C.B.

Lord Dacres Case.

Gregory Lord Dacres was summoned to answer Richard Gawton in a Plea of Debt for 26 l. 14 s. and did declare, that the Defendant did retain the Plaintiff to be his Bailiff of his Manor of Moreford, &c. and to receive the Defendants money for a certain time, and to do other businesses for the Defendant, and to render an account: and afterwards before one Launcelot Love, the Auditor assigned by the Defendant, the Plaintiff did account. Super quo computo prefatus Richardus pro diversis costagiis & expensis quæ idem Richardus circa prosecutionem & executionem negotiorum prefati Gregorii in surplusagiis in predict. 26 l. 14 s. erga ipsum Gregorium, ultra omnes denariorum summas per ipsum Richardum ad ipsum dicti Gregorii recept. permansisset. And thereupon he brought his Action; and the Defendant pleaded Nil debet, and it was found for the Plaintiff, and yet he had not Judgment.

First, because the Declaration was insufficient, because the Plaintiff was not in Surplusage to the Defendant, but the Defendant to the Plaintiff, and so are all the Pleas directly; and he ought to allege he was in Service, and that he had received Goods, whereof no mention is made.

Secondly, Because neither day nor place is alledged where the Auditor was assigned.

Pasch. 33 Eliz. in C. B. Rot. 409.

Owseleys Case

Roger Owseley brought a Replevin against Edmund Brach and others, the Defendant made Countenance as Bailly to John Levelson; and said, that long time before the taking, &c. one William Coup was seised of a house and eight acres of Meadow, &c. whereof the place is parcell, in his Demesne as of Fee, and did demise the same to Richard Coup for one and twenty years, reserving Rent, and the Lessee died, and the Land came to his Wife as his Executrix, who married Roger Owseley, and that William Coup did levy a Fine of the Premises to Stephen Noke and others, to the use of Stephen and his Heires, and after Stephen entered and ousted the Termor, and infeoffed John Levelson and his Heires, and then the Termor re-enters, claiming his Term, and for Rent arrears the Defendant made Countenance as aforesaid, and it was adjudged against the Defendant, because his entry and feoffment by Noke to Levelson, and the re-entry of the Termor is no Attornment, and this varies from Littleberries case, where the Lessee entered and made a feoffment, and the Lessee re-entered, for Noke the Lessee had not

Owens } { Sir Edward Cleeres } { Brownes  
Case. } { Case. } { Case.

not any Attozment, and can have no Distresse, and his Feoffee can not be in better case then he himself: And if the first Feoffee makes Feoffment to B. who enfeoffs C. and the Lessee re-enters, that is Attozment but to the first Feoffee, and not to the other, for he may be misconfant of it, because he was outed by the Lessee, but note Judg-ment was not given till Trin. 36 Eliz.

Pasch. 36 Eliz. in C. B.

Owens Case.

**E**dward Owen brought an Action of Waste against Peerce for land in Ancient Demesne, the Defendant made defence, and pleaded to the Jurisdiction of the Court, because the land was ancient Demesne, and the Defendant was ruled to plead over, for it is but a personall Action, and the Statute is a beneficiall Statute for the Common-wealth, and (by the opinion of all the Court, except Walmley) does extent to ancient Demesne, & 40 Ed. 3. 4. Ancient Demesne is a good plea in Replevin, 2 H. 7. 17. 21 Ed. 4. 3. it is no good plea in an action upon the Statute of Gloucester.

Mich. 33, and 34 Eliz. in C. B. Rot. 2122.

Sir Edward Cleeres Case.

**S**ir Edward Cleere brought a Quare Impedit against the Bishop of Norwich, Edward Peacock, and Robert Hinton Clerk, to present to an Abbotsen holden in Capite.

Anderfon. A Debite of an Abbotsen in grosse is hold, because it is of annuall value, whereof the King shall have the third part. But Owen, Beaumont, and Walmley held the contrary, and so it it was adjudged. See the Case of the Earle of Huntington against the Lord of Montjoy, of a Debite of Liberties of Cramford, which were not of any annuall value, and yet the opinion of Wray and Anderfon Justices was certified to some of the Councell being Arbitrators, that the Debite was not good.

Trin. 36 Eliz. in C. B. Rot. 2145.

Brownes Case.

**A**nthony Brown brought an Action of Trespasse against Richard Pease, the Case was this; John Warren was seized in fee of the Mannor of Warners, and of the Mannor of Cherchall, and demised his Mannor of Warners to the youngest son of Richard Foster his Cousin in fee, at which time Richard the Father had issue George Foster and John Foster. And he demised his Mannor of Cherchall in hæc verba.  
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I will my Mannor of Cherchall to Margery Warner for her life, and if she die, and then any of my Cousin Foster's Sons then living, then I will my foresaid Mannor of Cherchall unto him that shall have my Mannor of Warners, and after the Devisor died without issue, and the Reversion of the Mannor of Cherchall descended to Henry Warner as Brother and Heire of the Devisor. And after the said Henry Warner by Deed Inrolled, did bargain and sell the Mannor of Cherchall to Anthony Botone, who devised it to the Plaintiff: And then George Foster dies without issue, and the Mannor of Warners does descend to John Foster his Brother and Heire, who enters and enfeoffs the Lord Rich, and after marriage the Tenant for life of the Mannor of Cherchall dies, and the Plaintiff enters, and the Defendant enters upon him as Servant to John Foster, whereupon the Plaintiff brought this Action: And Judgment was given for the Plaintiff, because that the words and the intent of the Devise was, that the Mannors of Warners and Cherchall should go together, and therefore the Mannor of Warners was sold before the death of Margery, by John Foster, and after the death of Margery, John can take nothing by the Devise.

Mich. 29, and 30 Eliz. Rot. 2325. or 2929.

### Hambletons Case.

John Hambleton had issued four Sons, John the eldest, Robert the second, Richard the third, and Thomas the fourth, and devised to each of them a parcel of land, to them and the Heirs Males of their body begotten, and if it happen that any of their Heirs dye without issue Male of his body lawfully begotten, then the Survivors to be each others Heire. If these words make a Remainder, or are void, was the question. And it was adjudged against the Plaintiff, for the Court held that all those that survived were Joint-tenants, and one Joint-Tenant cannot have a Trespass against the other, for by the intent of the Will, it appears that the Survivors should have that part, and the Survivorship of each other Heire, each Survivor, that is, all that survive shall be each others Heire, and so the remainder should be to every one of them.

29 Eliz.

### Fenners Case, argued before the Lord Mayor of London at Guildhall.

In this Case it was adjudged, that if a man Covenants that his Son then within age, and infra annos nubiles, before such a day shall marry the Daughter of I.S. and he does marry her accordingly, and after at the age of consent he disagrees to the marriage, yet is the Covenant performed, for it is a marriage, and such a one as the Covenantor would have, untill the disagreement, vide 7 H. 6. 12. Dyer 143. 313. & 369.

25 Eliz.



25 Eliz.

## Webbe against Potter.

**I**n an Ejectione firme by Webbe against Potter, the Case was; Harris gave Land in Frank-marriage to one White, and the Deed was Dedi & concessi Iohan. White in liberum maritagium Iohanna filix mea habend. dicta Ioanna & heredibus in perpetuum tenend. de capitalibus Dominis feodi illius, with Warranty to Iohn White and his Heires Periam. The usuall words in Frank-marriage shall not be destroyed, for the words of Frank-marriage are, Liberum maritagium cum Ioanna filia mea, in the Ablative case, and although here it be in the Dative case, it is good. And of the same opinion were all the Judges.

Also a Gift in Frank-marriage made after the Esponsals was held good by all the Iustices, 2 H. 3. Donor 199.4 Ed 3.8. Dyer 262 B. And a Gift in Frank-marriage before the Statute was a Fee-simple, but not speciall taile, and if it be not a Frank-marriage, he shall have an Estate for life, and to prove this his opinion, he relied upon the intention of the Donor which ought to be observed: For if the Habendum does cross the Premises it shall be void, but a Remainder is good for the benefit of a stranger, but a Rent cannot be reserved upon such a Gift, during the four degrees, but after the Reversion is good, if he do attorne to the Grantee of the Reversion.

Windham, Frank-marriage is not an Estate in taile, for there wants the word, Heires, Coke lib. 1. 103. So a Gift to a man & semini suo, 10 Aff. 26. and after Meade agreed with Windham although the grounds of Frank-marriage were not observed, yet that it was good, for although there be no Tenure between the Donor and Donee, yet is it a good Frank-marriage.

Dyer, It is no good Frank-marriage, because the usuall words are not observed, and if the word Liberum be omitted, it is not Frank-marriage, neither is it good given to a man, but it must be to a woman, for a man cannot give land to a woman *Causa matrimonii prelocuti*: And in this case the party ought to be of the blood of the Donor, who by possibility may be inheritable to him, and there ought to be a Tenure between them, and an acquittall, and if any faile, it is no Frank-marriage, and he said further, that if it once takes effect as Frank-marriage, and then the Donor grants the Reversion, or the Reversion descends to the Donees, yet it shall not be destroyed, but shall remaine as an Estate in taile, and not for life, because it once took effect in the Donees and their issues, and if land be given to a man in Frank-marriage, the remainder in taile, yet this shall not destroy the Frank-marriage, and the Donor shall hold of the Donor, and not of him in the remainder: And if one give land in Frank-marriage, the remainder to the Donees in taile, yet is this a good Frank-marriage, and if the Donor grants over his Services, yet both the Frank-marriage continue, although the Donees attorn, for they are incident to the Reversion, and therefore the Grant is void, but if the Reversion be granted the Services will passe, and he concluded that the Husband had all, and the Wife nothing, because no Estate to her is mentioned in the Premises, and he could not construe the words to be the intent of the Donor, for here is an expresse limitation of the fee to the Husband and

and his Heirs, which cannot be controlled by intendment. And after 25 Eliz. It was adjudged to be no Frank-marriage, nor gift in tale, but a Fee Simple: And the Justices said, that the ancient Books were that where it took not effect as a Frank-marriage, it should be in especial tale, yet those at this time are not Law: But they agreed, that this at one time took effect as Frank-marriage, and by matter ex post facto may be made an Estate in tale.

Mich. 30 Eliz.

Gibbs Case.

**G**ibbs brought an Action of Trover against Basil, for a Gelding; the Case was.

One Porter stole this Gelding from the Plaintiff, and sold him to the Defendant in open Market, by the name of Lister, and it was entered so in the Toll Book that Lister sold him.

The question was, if this alteration of his name shall make any alteration of the property, although the sale was in open Market.

Windham and Rhodes Justices, held this no good sale to bar the Plaintiff, and grounded their opinion on the Statute of the 2, and 3 Phil. and Mar. cap. 7. which provides that no property of Stollen Goods shall be altered that are sold, unless the name and surname of the parties to the sale be written in the Toll-book: And Shuttleworth moved, that it should be in the Market, and walked there for an hour together, which is not set forth by the Defendant in his Bar; but the Justices said, that such special plea need not to be, but shall be intended.

Rouses Case.

**I**t was moved in this Case, that if Tenant for terme Dauter vie, does continue and hold in his Estate, after the death of Cestuy que vie: If he be a Disseisor, and whether in pleading, the plea ought to be seized and not possess.

Shuttleworth, He was legally in at first, and therefore cannot be a Disseisor, 15 Ed. 4. 41. A freehold could not be gained where he came in by the agreement of the party, and 12 Ass. 22. Where the Husband and Wife were seised of a freehold, and after were divorced by Suit; on the woman's part, whereby the woman is to have all the land, yet if the Husband continue possession and dies seised, this descent shall not take away entry, because he was no Disseisor.

Gawdy, He is Tenant at sufferance and no Disseisor, and there it was moved, that if Tenant at sufferance, or a Disseisor makes Copies of Copyhold Lands, if they be good or voidable: And notes that Wilde took here a diversity between a Termor that holds over, and a Tenant at sufferance; for in case of a Tenant at sufferance, there is no freehold taken from the Lessor; which the continuance of possession doth not take from him, but where the Tenant holds over his terme, there the freehold is disturbed, and therefore there is a disseisin: But at that present it seemed to the Judges that there was no diversity. But

the next terme Godfrey moved, that if Tenant for anothers life held over his Estate he had feefimple, and he granted that it was otherwise in some cases, for if he claim to be Tenant at the Will of the Lessor, he shall not gaine a Fee-simple: For Littleton in his Chapter of Releases. 168. saith, that Tenant at sufferance is where a man in his own wrong doth convey Lands and Tenements at the will of him that hath the Freehold, and such Occupier claimeth nothing but at Will. But in this case the Tenant claimes otherwise then at Will of the Lessor, he does not claim any thing but at the Will of the Lessor; as in the case of Littleton, but claimes to hold over against the Will of the Lessor, which is no Tenant at sufferance, and 10 Ed. 4. If a man makes a Lease at Will, and the Lessor dies, and he continues possession and claims fee, the Heir shall have a Mortdancer, and 18 Ed. 4. 25. If Cestuy que use dies, and the Tenant continues in, and the Tenant is impleaded, the Lessor shall not be received, and the reason is, because there is no reversion in him, but the Tenant hath it, and 22 Ed. 4. 38. by Hussey Justice, If a Termor holds over his Terme, there an Estate in fee is confest to be in him by matter of Law, but it is a doubt whether he be a Disseisor or not, but it seemeth not, for a Trespasse doth not lye against him before Reprise, and in the 7 H. 4. 43. If a Guardian holds the possession at the full age of the Heir, or Tenant for years after his terme expired, the Estate shall be judged in fee. And in our case he hath not claimed to hold at Will, for he hath done contrary, for he hath made Copies.

By all the Justices, if Tenant at will, or for years, or at sufferance, make a Lease for years, this is a Disseisin, and a Tenant at will doth thereby gaine a Freehold, and thereby doth claim a greater Estate then he ought, and so it is in this case.

2. Admitting him to be Tenant at sufferance, the question is, if he may grant Copies, and if whether they be good: and it seems he may, for no trespass lies against him, because he is Dominus pro tempore, and it is not like a Copy made by an Abator or Disseisor, for it hath been adjudged that Copies made by them are void, but in this case his act of making Copies agrees with the Custome; as in Grisbrooks case, If an Administrator sells Goods, and pates debts with the money, and after he who is Creditor probes the Will, he shall never abate this sale, for that it was done according to the Will which the Creditors were compelled to do: So in the 12 H. 6. If a Bailly cuts Trees and repairs an ancient Pale, this is good, and 6 R. 2. if he pates quit-rents it is good.

Coke, He comes in by right, and therefore is Tenant at sufferance, and like this case is Dyer 35 H. 8. 57. Lord Zouches case, where Cestuy que use for life, the remainder over in taile, made a Lease for the terme of the life of the Lessee, and dies, and the Lessee continues his Estate. And the opinions of the Justices of both Benches were, that he is but Tenant at sufferance.

Popham, If a Pannor be devised to one, and the Debisee enters and makes Copies, and then the Debisee is found to be void, yet the Copies of Surrender made by such Debisee are good; but contrary where new or voluntary Copies are made by him, 7 Eliz. and in the Lord Arundells case, a feoffment in fee was made of a Pannor upon condition, the feoffee upon Condition grants voluntary Copies, those are good.

Arkins, on the contrary: And he made a difference between a Tenant at will, and a Tenant at sufferance, for a Tenant at will shall have



habe ad, but so shall not the other, as in the 2 H. 4. and a Release to one is good, to the other not, &c. and when he holds over he both assume an Interest which shall not be thought wrongfull, for he is neither Abator, nor Disseisor, and therefore Dominus, and therefore the Copies made by him are good, 4 H. 7. 3. Tenant at sufferance may justify for Damage-tenant. And all the Justices held for the Plaintiff, and that he that made the Copy was but Tenant at sufferance, and not Disseisor, and that he had no Fee. And the Judgment was to be entered, unless the Defendant showed better matter,

Trin 28 Eliz. Rot. 329.

Smiths Case.

Smith assumed upon himselfe, that when I. N. was indebted to I. D. in an Obligation of forty pounds, that if I. D. would not implead the said I. N. that then if the money were not paid at such a day, that then he, viz. the said Smith would pay the money: Upon which Assumpsit after the day I. D. brought his Action on the case, and did set forth in his Declaration that he did not implead I. N. and it was moved by Kingsmill, that he could not have this Action untill I. N. be dead, for so long as he lives I. D. hath time to implead him. As if a man promiseth another that he will be named in his Action that he hath against a third person, and if the third person payes not the money at such a day, then he will, he cannot sue unless he shewes he hath discharged the other of the Obligation.

Clench, It is implied that he will never implead him.

Shuttleworth Justice, not so, for if hereafter he sue him contrary to his promise, then the other who made the Assumpsit shall have his Action on the case, and recover to the value of the sum in the Bond. And after the case was moved again, and the Plaintiff brought the Obligation in Court, and thereupon the Obligation was entered, so that now the Plaintiff could not implead I. N. in posterum, for which Judgment was entered for the Plaintiff.

29 Eliz.

Cosens Case.

When the Father had issue three Sons, John, George, and Thomas, John the eldest died in the life-time of his Father; his Wife Enfeint with a Daughter, the Father makes a Devise in these words:

That if it shall please God to take to his mercy my Son Richard, before he shall have issue of his body, so that my Lands shall descend to my Son George before he shall be of the age of one and twenty years, then my Overseers shall have my Land untill George come to the age of one and twenty years.

If Richard who is yet living had an Estate in tale by these words, was the question. And all the Justices agreed that it was a plain implication to make an Estate-tail in Richard the second Son, 13 H. 7. 17.

29 Eliz. in C. B.

Warrens Case.

**W**illiam Warren brought an Action of Debt for forty pounds, and in his Declaration confessed satisfaction of twenty pounds, and hereupon a Writ of Error was brought in the Kings Bench, and the Judgment reversed: For by his Declaration he had abated his owne Writ, and he ought to have Judgment according to his Writ, and not to his Count. And Error was brought upon the Outlawry; for if the first Record was reversed, the Outlawry thereupon is reversed.

4, and 5 Phil. & Mar.

**B**enlowes Perseant moved this case, a man seised of Lands and Tenements in London, devises them by these words.

I will and bequeath unto my Wife Alice my livelyhood in London for terme of her life. By this Will the lands in London passe to the Wife by this word, Livelyhood. Nota, for Brook Justice said, that it was in ancient time used in others places of this Realm, and had been taken for an Inheritance: To which Dyer agreed.

Case of Slander.

**B**rook said, that if a man speak many slanderous words of another, he who is slandered may have an Action on the case for any one of these words, and may omit the others: But if a man write many slanderous things of another in a Letter to a friend, an action upon the case will not lye, for it shall not be intended that it is done to the intent to have it published.

Mich. 1, and 2 Eliz.

**N** Arch-bishop of York, and I. B. Executors of the last Will and Testament of Thomas Duke of Norfolk, did bring a Writ of Ravishment de Guard, and then he was deprived by his own consent: The question is, if the Writ shall abate.

Benlowes, It shall abate, for if a Dean and Parson of a Church bring an Action for such a Customs, and then resigne, the Writ shall abate, because it is their own Act.

Dyer, The Writ shall not abate, for the Action is not brought in their

their own persons, but in their Testators, and therefore the Action shall continue. And if a man be outlawed he may bring an Action as Crecitor, and the Writ shall not abate.

Browne, If I make I.S. my Attorney, and he (the Warrant of Attorney still continuing) is made a Knight, yet is not the Warrant of Attorney determined, although the word Knight, which is now part of his name be not in the Warrant, therefore in this case the Writ is good.

### Mich. 7 Eliz.

**N**ote, it was said by Browne, that if H. does let the Cite of his Manor, with all his Lands to the said Manor appurtenant, hereby all the Demesne lands do passe; but if it were with all the Lands appertaining to the said Cite, nothing passeth but the Manor place.

### Pasch. 6 Eliz.

**A** Man seised of the Manor of Dale, doth let the same with all the Members and Appurtenances to the same, to have and to hold all the members of the said Manor to the Lessee, for terms of years.

Walsh and Weston were of opinion that this was a Lease for years of the Manor onely, and that the limitation of the word, Members, being after the Habendum was void. But Dyer and Browne were of the contrary opinion: And Browne said, that when the Habendum is used by way of limitation, it shall not be void. As if he let his Manor of Dale, to have and to hold one acre parcell thereof for a terme of years, the Lease is void for all, but if there had been no Habendum but the Lease for years had been limited in the Premises of the Lease, that is good enough: And if the Lease had been Habendum every part thereof, that had been a good Lease of the Manor, for all the parts comprehend all the Manor. And Dyer said, that the word, Members, shall be taken for the Tithes and Hamlets wherein the Manor hath Jurisdiction.

Note, it was said by Dyer, that if partition be made by the Sheriff, although the Writ be not returned, yet it is good enough, and none of the parties shall except against it, and so was the better opinion concerning the Estate of Culpeper and Navall in the County of Kent.

Sutton brought a Writ of Ravishment of a Ward against Robinson, wherein it was resolved by Dyer, Carus, Weston, and Benlowes, That if the Tenant infeoff his Lord and others, all the Seigniorie is extinct: also if the Tenant does infeoff the Lord but of a Povertie, yet is all the Seigniorie extinct: And Dyer said, that if the Tenant does infeoff the Lord and a stranger to the use of another and his Heires, and makes Libery to the stranger, this is no extinguishment of the Seigniorie, but if the Libery were made to the Lord, it is otherwise; and yet is the possession instantly carried away to the stranger by the Statute of 2 H. 7. 13.



A man seised of lands devises the same to his Wife, to dispose and imploy them for her self and her Son, according to her will and pleasure.

Dyer, Weston, and Walson held that the Wife had a Fee-simple by the intendment of the Will, and the Estate is conditionall, for each intention will make a Condition in a Devise, but not in Grant, vide Dyer 20.6.

A woman Tenant in taile makes a Lease for one and thirty years, and after takes a Husband, who have issue, the Husband (being Tenant by the Curtesie) surrenders, the Heirs doth oust the Lessee, and the Lessee brings an Escheatment: And it was held that the Surrender was good, and that the Privilege was sufficient.

### Mich. 40 Eliz.

**I**n an Action of the Case for calling one Bastard; Dyer and Walsh said an Action would lye, but Browne on the contrary, because it shall be tried in the Spiritual Court. And Dyer said, That at Barwick Assises a Formedon in the Descender was brought, and one said, that his Father by whom he claimed was a Bastard, and thereupon he brought an Action against him for those words, and recovered.

Carlin said, That if Lands be given to a man and to the Petres, he shall engender on the body of an English woman, and he marries a French woman, and she dies, and then he marries an English woman, that now this is a good Estate in special taile.

### Pasch. 7 Eliz.

**T**he Prior and Monks of the Charter-house (before the dissolution) made a Lease for four years, reserving the ancient rent of twenty five Quarters of Wheat per annum, and then the house was surrendered into the hands of King Henry the eighth, and then the Lord Chancellor did let the said rent of twenty five Quarters of Wheat to I. S. for four and twenty years. And it came into question between I. S. and the Termor, if this was warranted by the 27 H 8. 28. Harper and Porrell, it is not, for the Statute is, that they may make Leases of any Mannors, Lands, Tenements, and Hereditaments for one and twenty years, &c. and this Wheat is neither Land, Tenement, nor Hereditament, but a Chattell, and shall be demanded in an Action of debt. But the opinion of all the Court was, that the Lease was good, and they did agree that it was directly within the word Hereditaments, for it may descend or escheat, and the wife shall be endowed thereof. Also upon a Lease of Coyne a Rent may be reserved, for a man may reserve a Rent upon a Lease of a Rent, and the Rent is not parcell of the Reversion, but onely incident thereunto, and the Lessor hath the same inheritance therein as he hath in the Reversion.

Trin.

Trin. 7 Eliz.

**A**ssurance was made to a woman, to the intent it should be for her Joynture, but it was not so expressed in the Deed. And the opinion of the Court was, that it might be averred that it was, for a Joynture, and that such averment was not traversable; and so was it in the case between the Dusen and Dame Beaumont.

Winter brought an Action of the Case against Barnam for these words, viz. Thou Murthrer: Dyer and Walsh said, that the Action would lye, for there are some words that cannot be qualified, as Murthrer, Theef, Extortioner, false Knave, and in such Case an Action will lye, but contrary where such words are spoken in a jesting way.

Pote by Dyer, that the Lord Fitz-James, late Lord chief Justice of England, did devise his land to Nicholas Fitz-James in fee, with divers remainders over, and in the same devise he devised others Jewels and peeces of Plate, viz. the use of them to the said Nicholas Fitz-James, and the Heires Males of his body. In this case it was the opinion of the Court, that the said Nicholas had no property in the said plate, but onely the use and occupation. And the same Law where the Devise was that his Wife should inhabit in one of his houses which he had for terme of years, during her life, because the Wife takes no interest in the terme, but onely an occupation and usage, out of which the Executors cannot eject her during her life, but Walsh held the contrary.

Hil. 8 Eliz.

**I**f a Bishop make a Lease for years the second of May, and the Dean and Chapter confirms it the first of May, this is a good Lease after the Bishops death by Carlin and Southcote.

Wray, How can a Lease be confirmed before it be made. Carlin and Southcote, The assent before is a good confirmation after.

Hil. 40 Eliz.

**A**ss Obligation wanted these words, In cujus rei Testimonium, and yet adjudged to be good, 7 H. 7. 14. Dyer 19 A.

It was said by Carlin in the Star Chamber, that if an Infant being a feme covert, or other Infant does levy a fine by grant and render to her or him in fee, or for life, and the Husband dye, the Wife shall not have a writ of Error, because she is Tenant of the land, and she cannot have a writ of Error against her selfe; so that she is without remedy, so in the case of the other Infant.

Cardell, Master of the Rolls, in the case between Stinkley and Chamberlain said, that when Executors had Goods of their Testator, to dispose of to pious uses, they cannot forfeit them; for that they have them not to their own use, but their power is subject to the controule

ment

ment of the Ordinary, and the Ordinary may make distribution of them to pious uses. And it was said at the Bar, that the Ordinary might make the Executors account before him, and to punish them according to the Law of the Church if they spoile the Goods, but cannot compell them to employ them to pious uses.

## Hil. 28 Eliz.

**I**n an Action of Slander, the words were, Thou art an arrant Whore and hadst the French Pox. It was moved in Arrest of Judgment, that the words were not actionable, because part of them relate to the time past, but by the Court adjudged that the action is well brought, because it is a discredit to the woman, and thereby others will shun her company.

## Trin. 31 Eliz.

## Inter Winter and Loveday.

**I**n this Case which was put by Coke, it was agreed, that a stranger as Cornwall in this Case was, could not tender the money to be paid upon the Mortgage, for it ought to be one who hath interest in the land: and so was it in the 28 H.8. between Whaydon and Ashford, where the Mother ought to have made the tender for her Son within age, and because it did not appear within the Writ what age the Infant was, whether he was of the age of fourteen years, or more, so that his Mother could be Guardian to him by reason of his Minority or not, It was awarded that she could not make a lawful tender.

In an Assumpsit for a hundred pounds, the case was; That the Defendant in consideration of a French Crown given him by the Plaintiff, did assume and promise, that if he did not such an act before such a time, that then, &c. It was moved by Godfrey, that the Plaintiff cannot recover so much as he is dammified by the French Crown: and the like case was before the Chancery, where a Gentlewoman took the death of her Husband so heavily, that she said, she would never marry again; and her Son comforted her, and said, God will provide a new Husband, and said, that he would give her ten pounds to pay a hundred, when she should marry, which money she accepted of, and then the Son brought an Assumpsit for the hundred pounds within half a year after she married. And the matter was brought into the Chancery: And the Master of the Rolls awarded ten pounds only, and said, he would give never a penny more, because it was unreasonable to bar a Gentlewoman from marriage.

The Lord Rich was seised of Hadley Park, and of all the Tythes thereof, and payed for the Tythes but one Buck in the Summer, and a Doe in the Winter for thirty years past. The Park was deparked and turned into arable land, and the Parson would not receive the Fee Buck and Doe, but would have the Corne, and thereupon brought



Mich. 13, and  
14 Eliz.

Mich. 14, and  
15 Eliz.

35

brought him into the Spirituall Court, and he brought a Prohibition. And Carus and Catlin said, that he need not pay other Tythes but Back and Doe, for although they be not tythable, yet may they be paid by composition, and he may not take them, but they are to be delivered to him: and in like manner Partidges and Wheasants in a Garden are not tythable, yet may they be paid in lieu of Tythes, and shall be brought to the Parson, and although there be no Park, yet may he give a Back out of another Park, and perhaps it may be made a Park again.

Mich. 13, and 14 Eliz.

**N**ote: it was said by Dyer, that an Administrator durante Minoritate, cannot bring an Action of debt, for he is but as a Servant of the Ballif in such cases.

A Devisse was made to the Bishopp, Chamberlaine, and Governours of the Hospitall of Saint Bartholmews: whereas they were Incorpsorated by another name, yet the Devisse held good by Dyer, Weston, and Manwood, for it shall be taken according to the intent of the Devisse: And Weston said, that a Devisse to A.B. a mans eldest son is good, although his name be not B. because the other words do make a sufficient certainty.

It was said, That by the Grant Panagium Hoggs may eat the grasse, but if a man grant his Acrons, the Grantes must gather them; and where Panagium is granted the Grantes may put in his Hoggs into the place granted.

If Tenant for years hold over his terme, he is Tenant at sufferance, and his descent shall not take away entrie: But if Tenant for terme of anothers life hold over his terme, he is an Intruder, and his descent shall take away entrie. Quod fuit concessum per Dyer.

A Court Baron may be holden at any place within the Pannoy, but not out of the Pannoy, and so a Leete may be held in any place within the Liberty and Franchise, and although no Court hath time out of mind been holden within the Pannoy, yet it is not thereby lost, for it is incident to a Pannoy of common right, Coke L. 4. 26. 6. 27. A.

Mich. 14, and 15 Eliz.

**A**n account was brought by Tottenham against Bedingsfeild, who pleaded Ne unques son Bailly per account render.

Gawdy prayed the opinion of the Court if the Action would lye. And the Case was thus.

The Plaintiff had a Lease of a Parsonage, and the Defendant, not being Lessee, nor claiming any interest, took the Tythes being set forth, and carried them away. If the Lessee may have an account against such Trespasser, was the question.

Manwood Justice, An Account will not lye because there is no possibility;

bity, and wrongs are alwaies without pibity, yet I will grant that if H. receibe my Kents, I may have an account against him, for my assent to have him receibe it makes a pibity, and when he hath receibed the Kent, he hath not committed any wrong against me, because it is not my money till it is paid: and therefore in this case I may resort to my Tenant, and compell him to pay the Kent to me, because the receipt is no wrong: But it is otherwise in the first case, for when the Tithes are set forth, they are presently in the possession of the Parson, so that when the Defendant takes them, he is a wrong Doer of them, and therefore no account will lye against him. And so was it adjudged in a case of a Pannoz in London, where one under colour of a Debit did occupy the Land for twenty years, which Will afterwards was made void, and thereupon he to whom the right of the land belonged brought an account, and it was adjudged that it would not lye.

Harper, An Account will lye against a Proctor, so that the Plaintiff may charge him as Proctor, and it is no plea for him to say he is no Proctor, no more then it is for a Guardian in Socage to say, he is not Prochein amy.

Dyer, there are three Actions of Account. One against a Bailly, another against a Receiver, the third against a Guardian in Socage. And if an Account be brought against a man as Receiver, he must be charged with the receipt of the money: but if the Defendant pretends he is Owner of it, it is contrary to the nature of an account, and therefore he is not chargable in such Action, but he may plead Ne unque son Bailly pur account render: for in an Account (as my Brother Manhood said) there must be pibity: But an Abator, or an Intruder shall not be charged in an Account, because they pretend to be Owners. But in this case the Lessee may have an Action of Trespass against him, for the Tithes were immediately upon the setting forth in the possession of the Lessee, and by the Statute of the 31 H. 8. 7. he may have an Ejectione firmæ: but an account will not lye in this case.

### Mich. 14 Eliz.

**T**enant in Dower commits Waste, and the Waste was assigned in this Case, that the Lessee had destroyed a hundred Does of the Plaintiff, whether this was Waste or no, was the question.

Dyer, I think it no Waste, unless he had destroyed all the Deer.

Manwood, If a Lessee of a Pigeon house destroy all the old Pigeons, except one or two, yet it is a Waste, and so is this, although all be not destroyed.

### Mich. 15 Eliz.

**A** Pan is indebted by Obligation in a hundred pounds to a Testator, this Obligation is an Asset in the hands of the Executors until it be recovered by them, because it is but a Chose in Action; but if in such case the Executors release the Debt now he hath determined the Action, and hath made it Assets in his hands to the whole value of the Bond.

## Blifs against Stafford.

**M**argaret Blifs who was in Remainder after an Estate in tale, did bring an Action on the case against Edward Strafford, for standing her Title in affirming that A. had issue one B. who is alive, and the Defendant pleaded not guilty, and the Action adjudged good by all: But did abate for an exception to the Count.

## Pasch. 13 Eliz.

**U**pon the Statute of Recusancy made the 29. of Elizabeth, Thomas Salherd and Henry Evered being committed of Recusancy, for not paying twenty pounds for every month, a Commission was awarded to enquire of their Goods and Lands in Suffolk to levy the said Debt; and amongst other Lands certain Copyhold Lands were seised, and being returned, the parties came in, and by way of plea did set forth, that some of their Lands seised were Copyhold; and did pray Quod manus Domine Regine amoveantur, and hereupon the Queens Attorney demurred; upon which the question was, if Copyhold Lands were within the said Statute of the 29 Eliz.

Snagge, The Lands and Hereditaments which the Statute speaks of, are such as are known by the Common Law, and not by Customs, for if I grant all my Lands & Hereditaments in D. my Copyhold lands will not passe: so that it seems to me Copyholds are not within the Statute.

Popham contra. If Copyhold Lands are not within the Statute, some persons shall be free; and he held that Lands in ancient Demesne were within the meaning of the Statute, although not within the words: and he agreed, that where a Grant is made of all my Lands and Tenements in D. that Copyhold Lands passe not, because they cannot passe by such assurance, and that Copyhold Lands were not within the Statute of Bankrupts, if they be not particularly expressed, and a Copyhold cannot passe by grant but by surrender. But after great debate it was adjudged, that Copyhold Lands are not within the Statute by reason of the prejudice that may come thereby to the Lord, who hath not committed any Offence, and therefore shall not loose his Customs and Services.

## Trin. 30. Eliz.

**I**n the Case of M<sup>r</sup>count Bindon, it was holden that if a man hath Judgment in Debt upon an Obligation and no execution, yet he may commence another Action upon the same Obligation, but otherwise of Contract, 9 Ed. 4. 51.

A question was moved, that if a man grants Vesturam terræ what both passe: and it was said by Clerk, that one man may have the Vesture & another the Soil. Lord chief Baron, he who hath Vesturā terræ cannot dig the Land: And if many have a Meadow together, viz. to be divided amongst them every year by lots how much every one shall have of graze in such a place, and how many in such a place, and so to change every



every year according to the lots, they have not a Freehold, but onely vesturam terræ. Dyer 283.6.14 H.7.4.8.6.31 H.7.37. Dyer 375.6.13 H.6.13.14 H.8.6.

In the Case of a Dean and Chapter, the question was, that if a Lessee for years be rendering Rent with clause of re-entry for non-payment, and then the Reversion or Rent be extended by a Statute, or letted into the hands of the King for debt, if the Lessee shall pay the Rent according to the extent, and no breach of the Condition although he pay not the Lessor. And the chief Baron held it was no breach of the Condition, because he is now compellable to pay it according to the extent.

### Caltons Case.

It was moved by Serjeant Fenner, and agreed by all the Barons, that if the King make a Lease to A. rendering Rent, and there the Lessee lets parcell hereof, rendering Rent, in this case the second Lessee shall not have the privilege of the Exchequer to fly thither to be sued concerning this Land, because that by such means all the causes in England, may be brought into the Exchequer, and hereupon Fenner said, that he had demurred upon a Bill exhibited into the Exchequer Chamber by such a Lessee, and prayed the Court that he might not answer, and he was thereupon dismissed.

Upon not guilty pleaded, the parties joyned issue, and after evidence given, and the Jury dismissed from the Bar, some of them had Apples, and Figs, whereof the Court taking notice when they came to give their Verdict, did examine them upon their Oathes, and they who had eaten were fined five pounds, and committed to the Fleet. And some of the Justices did doubt if the Verdict were good; and upon many Presidents had, it was adjudged good: and they relied much on the President of the 12 H.8. Rot. 102. where one of the Jury did eat before they were agreed, and yet the Verdict was good: And after a writ of Error was brought, and the Judgment affirmed, 20 H.7.3.13 H.4.13.

### Windsmore w Pasch. 27 Eliz. Hubbard

**A** man gives land to I.S. in the Premises, Habendum to him and three others for their lives. Et eorum diutius viventium successive: The question was, what Estate I.S. had, and whether there be any occupancy in the case.

Coke h. l. b. that I.S. had but an Estate for his own life, because he cannot have an Estate for his own and anothers life, where the interest of both begin at one instant, and the Habendum by no means can make a Remainder; as if a Lease be made to one for life, habendum to him and his first begotten Son, this makes no remainder to the Son, although some have held to the contrary: so of a Lease to one for years, habendum to him and another, does not make any remainder to the other: also the word, Successive, will not make a remainder, as in the 30 H.8. Br. Joynt-tenant 53. Also one cannot have an Estate for life, and

*Coke Eliz. 53. pl. 0.*

for anothers life also in present interest, for the greater both drowned the lesse, but if the greater be present and the other future, as a Lease to him for life, the remainder to him for anothers life, or a Lease for life and three years over, this is good; but if a Lease be made for life and for years, the Lease for years is drowned, 19 Ed. 3. Surrender 8. where Tenant for life of a Spannow did surrender to him in the Reversion, &c.

Gawdy, If a Lease be made to one for life, and so long as another shall live, quare, what Estate he hath.

And as to the second point, certainly there cannot be an Occupancy, for if the Estate be void, the Limitation is void; also the Occupancy is pleaded *Que un tiel*, and does not say, Claymant comme occupant, &c. for if a man comes a hawking on Land, he is not an Occupant, and the Book of Entries is, that he ought to plead it.

Clinch Justice, every Occupant ought to be in possession at the time of the death of the Tenant, for otherwise the Law calls the Interest upon him in the Reversion. But Gawdy and Chute denied this: and after, viz. 29 Eliz. the Case was moved again by Popham, and he made three points.

1. If the other three had a joint Estate.
2. If they had a Remainder.
3. If there be an Occupancy. And he was of opinion that they had nothing by the habendum, for they were not named in the Premises, & they cannot have a Remainder for the uncertainty, but if those three had been named in the Premises, habendum to them Successive, as they had been named, there they had a Remainder, for there the certainty appeared, 30 H. 8. 8. Dyer 361. Also there can be no Occupancy during the lives of the other three: but he agreed to the Book of the 18 Ed. 3. 34. that a Lease for life, the Remainder to him for anothers life was good: And that if a Lease be made to I. S. and a Monk, it is void to the Monk, and the other hath all, and that during the life of the Monk there can be no Occupancy. And if I make a Lease to I. S. for the life of a Monk, it is a good Lease: And till the same terme Judgment was given, that they could take nothing in possession jointly, nor by way of Remainder, and that no Occupancy could be in the Case, and that I. S. had Estate for terme of his owne life onely.

### Stile against Miles.

Stile Parson did suggest that the Land was parcell of the Glebe of the Parsonage, and that the said Stile did let the said Glebe, being foure and twenty acres to Miles for years, rendring thirteen Shillings foure pence Rent; and in a Prohibition the case was, if Wythes were to be paid. And Wray said, that although it was parcell of the Glebe, yet when it was leased out Wythes ought to be paid, and if no Rent be reserved, Wythes ought to be paid without question; but there may be a doubt where the Rent is reserved to the true value of the Land; but here the Rent is of small value, wherefore Wythes shall be paid also. And the Reservation of the Rent was *Pro omnibus exactionibus & demandis*; yet the Justices took no regard of those words. But Godfrey said, that those words would discharge him; but Wray on the contrary, for that this Wythe is not issuing out of the Land, but is a thing collaterall, and if a Parson do release to his Parishioners all

all demands in the Land, yet Tythes are not thereby released, for such generall words will not extend to such a speciall matter. And in the 15 of R.2. Avowry 99. one held of another by ten Millings for all Services, Suits, and Demands; yet the Tenant shall pay Relief, because it is incident to the Rent, and 8 Ed.3. 26.

Mich. 29 Eliz. Rot. 2574. or, 2375.

Stephens against Layton.

**I**n an Ejectione firma upon issue joyned, the case in a speciall Verdict was, that a Lease by Indenture was made by William Beale to one William Pyle and Philip his Wife & primogenito habend. to them, & diutius eorum viventi successive for terms of their lives, and then the Husband and Wife had issue a Daughter: The question was, if the Daughter had any Estate. And three Justices held that she has no Estate, because she was not in being at the time of the Lease made, and a person that is not in esse cannot take any thing by Liberty, for Liberty ought to carry a present Estate, where the Estate is not limited by way of Remainder, 18 Ed.3.3 17 Ed.3.29, & 30. adjudged: but it was said at the Bar, that if the Estate had been conveyed by way of use, it is otherwise. And the said Justices held clearly that the word Successive, would not alter the case: And the case was further found, that William Beale and Sampson Beale did covenant with one Lendall, that if Tho. Beale Son of Sampson Beale, should marry Margaret the Daughter of the said Lendall (if she would assent) and also that the said Lendall did covenant that the said Margaret should marry the said Thomas (if he would assent) Pro quo quidem Maritagio sic tum postea habendo, the said William Beale covenanted, that he would make, or cause to be made an Estate to the said Thomas and Margaret, and to the Heirs of their bodies for the Joynture of the said Margaret, and it was further found, that afterward a fine was levied between the said Thomas and Margaret Plaintiffs and Sampson Beale and William Beale Deforcants, Qui quidem finis fuit ad usus & intentiones in Indentura prædict. specificat. by force whereof the said Thomas and Margaret were seised: but the Jury found nothing of the Marriage, whether it took effect or not; and further found that William Pyle and Philip his Wife had Primogenitam prolem a Daughter, and then died, and then Thomas Beale died, and his Wife intermarried with one Lamock, who made a Lease to the Plaintiff, who was ousted by Layton the Lessee of Philip Pyle. And hereupon it was moved by Gawdy Serjeant, that inasmuch as the Marriage took no effect between Thomas and Margaret, the uses cannot be in them, but the fine shall be to the use of the Cousins, which was opposed by Walshey Serjeant, who said, that it was not like a Covenant in consideration of marriage to stand seised of such a Manor, for there if the considerations faille, the uses faille also, for the consideration onely is the sole and entire cause that makes the uses to arise: but in this case the consideration is not materiall, but the fine effectually, without consideration of money paid: and if a feoffment be made to the use of I S. although no money be paid, yet I S. shall have the Land.

Windham,



Britman against  
Stanford.

Doctor Lewin against  
Munday.

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Windham, The Cases differ much, for here the Fine is not express to be leibed to the use of Thomas and Margaret, but to the uses and consents contained in the Indenture: but he said, that the common course was to limit the use to the Conuor, untill the Marriage took effect, and after, as before was urged by Walmsley. And the Jury found that Thomas and Margaret, were seised accordingly.

Winham, They are no Judges to determine doubts in Law.

Rhodes Justice, Wherein they have taken notice but of the matter in fact, and he affirmed the difference put by Walmsley.

Windham, The case de matrimoni: prelocut: is stronger then this Case, for the secret intention shall reduce the Land, if the marriage take no effect. And after (the Court being full) they all agreed to the difference put by Walmsley, and also that the sale afterwards was not good by reason of this Limitation. And Judgment was given for the Plaintiff accordingly.

Hil. 26 Eliz.

Britman against Stanford.

Upon a speciall Verdict, the Case was, A House, Stable, and Hay-lost were demised to one for years, rendring four and twenty pounds Rent *per annum*, and four and twenty pounds for an In-come, quarterly by equal portions, upon Condition that if any of the Rent, or In-come be behind at the time it ought to be paid, that then the Lease shall cease and determine. The Lessee makes a Lease of the Stable to the Lessor, and after part of the In-come is behind and unpaid, and the Lessor enters for the Condition broken into the house: And if this was a good entry, was the question. And Judgment was given that the Condition was gone and void, by reason of the Lessors taking part of the thing demised, because a Condition is speciall and intire, and not to be severed. And in this Case Fenner said, that a Grantee of a Reversion cannot take benefit of a collateral Condition, as in case of a gross summe, but in case of a Rent, waste, &c. it was otherwise.

Mich. 29, and 30 Eliz. Rot. 2529.

Doctor Lewin against Munday.

As a Replevin by Lewin against Munday. It was found by Verdict, That a Fine was leibed the 14th. of Elizabeth, between Lowia and Rutland, Plaintiffs, and Fook and seven others Deforcants of the Pannoz of Collochall, whereby the Defendant did grant the Pannoz to the Plaintiffs, and the Heires of one of them, who granted and rendered twenty pounds per annum to the said Fook and his Heires, with a Distresse for non-payment. Fook lessee of the Rent, makes a grant to a stranger in this manner, That whereas a Fine was leibed the 14. of Eliz. of the Pannoz aforesaid, and divers other lands, &c. and misseok the Pannoz, for he put the names of the Conuisors in place of

potho 153.

of the Consoys, and so e contra, and that it was letted of the Mannor, and others other lands, whereas the Fine was letted of the Mannor solely; and that he did grant the said Rent granted unto him to the said Stranger and his Heires: And this grant was assented by Anderson who said, that it one recte that he had ten pounds of the grant of I. S. whereas it was of the grant of I. D. yet it is good.

Hil. 30 Eliz. Rot. 17. 32.

Hunts Case. Cro. Eliz. no. 8. 3.

**H**unt brought an Action on the Case against Torney, and declared that he being seised of lands in Swanton in Norf. in fee, Secundum consuetudinem Mannerii, the Defendant did promise to the Plaintiff, in consideration the Plaintiff would permit him to occupy the same for the space of five years, that he should pay him at the Feast of All-Saints next coming, and so yearly twenty pounds at the Feasts of the Annunciation, and All-Saints by equal Portions, during the terme aforesaid, and alleged that he had enjoyed the lands by the space of a year and half, and so brought his Action on the Assumpsit. And Anderson was of opinion that untill the five years were expired, no money was to be paid, because the Contract was intire. But all the other Justices on the contrary, for the consideration was to pay a certain summe yearly, which made severall duties and so severall Actions. For by Periam; if a man be bound to pay I. S. twenty pounds in manner and forme following, viz. ten pounds at such a day, and ten pounds at such a day, in this case the Oblige cannot have an Action of Debt for the first, before the day of payment of the last ten pounds be paid, because the duty in it self is an intire duty, but if a man be bound to pay I. S. ten pounds at such a day, and ten pounds at such a day, here the Oblige shall have his Action for the first, because the duty was in it self severall. And Anderson at another day said, that if a man makes a Lease for ten years, rendering Rent; in that case he may have an Assumpsit for the Rent due every year: So if I covenant with you to build you twenty houses, the Covenantes shall have a severall action for each default.

Periam, That Case of the Assumpsit is much to the purpose, for an Assumpsit is in the nature of a Covenant, and is indeed a Covenant without writing.

Rhodes cited the Case Caspaigne, wherein in consideration of a marriage of his Daughter with such a mans son, to give seven hundred marks, and to pay a hundred marks every year, untill all the summe were paid, and it was held clearly in this Court, that a severall action might be brought upon every hundred pounds, but because the action was brought for all the seven hundred marks before the seven years were out, Judgment was given against him, for if a man be bound in a Bond or a hundred pounds to pay twenty pounds for so many years, he shall not have an Action of Debt untill the last year expired. And after Judgment was given to the Plaintiff, viz. Mich. 19. Eliz. Rot. 22. 48.

28 Eliz.

28 Eliz.

Between Sticklehorne and Hatchman.

**A** Judgment by the Court, that if for not scouring of a Ditch or Pote, the Grounds of the house are putrified; or Trees cut down which are in defence of the house, whereby the house by tempests is blown down, Damages shall be assigned in Domibus pro non Scourando, &c.

**I**n an Ejectione firmæ, Broker Procheinoray said, that where the title of him in the Reversion is not disclosed in pleading, nor cometh in question, it shall not be granted.

Pasch. 28 Eliz. in C.B.

Yardley against Pescan.

**T**he Queen seized of an Abbotsdon being void, the Ancestors of Pescan presented, and so gained it by usurpation, and then the Church being void, he presented again, and his Clerk is now dead, and then the Queen grants the Abbotsdon to Yardley the Plaintiff, and he brings a Quare Impedit in the name of the Queen, supposing that this usurpation did not put the Queen out of possession, and it was argued that the Grant could not pass without her assent, because it is of the nature of a Chose in Action, and this was moved the last term, and then Dyer, Meade, and Windham held that this usurpation did gain possession out of the Queen, and that she should be put to her writ of Right of Abbotsdon, and now this term Fenner moved the case againe, and the opinion of Anderson that was the chief Justice of the Common Pleas, was clearly, that the Queen was not out of possession, for he said, that it was a rule in our Books, that of a thing which is of Inheritance, the act of a common person will not put the Queen out of possession, but if she had but a Chattell, as the next Abbotsdon, then perhaps it is otherwise: But Meade, and Windham held very earnestly the contrary, and they relied on the Book of 18 Ed. 3. 15. where Shard said, that if the King had an Abbotsdon in his own right, and a stranger who has no right did happen to present, that put the King out of possession. And the King shall be put to his writ of Right, as others shall: vide 47 Ed. 3. 14. & 18 Ed. 3. 16. The Defendant there did allege two presentments in his Ancestors after the Title of the King, and demanded Judgment if the King should have a writ of possession, and the plea was admitted to be good; but after Pasch. 25 Eliz. Judgment was given for the Queen, for that she might very well maintain a Quare Impedit, and the two presentments did not put her out of possession.

31 Eliz.



31 Eliz. Rot. 211.

**S**ir Robert Rowley made the Lord Roper Sir Robert Catlin, and Sir Robert Catlin, and died: and they willed their Letters to the Ordinary, certifying that they were made Executors, but that they could not attend the executing of the Executorship, and therefore they required him to commit the Administration to the next of kin, *ut lex postulat*. The Ordinary enters in the Register, *Quia* Executors predicti per testamentum predictum distulerunt, &c. and thereupon committed the Administration over: Afterwards the Lord Catlin received the Rent of the Farm, and after granted it to a stranger. The Administrator ousted the Lessee, and he brings an Ejectment. And if this writing was a refusal in the Executors, or not, was the question: And it was said by Ford Doctor of the Civil Law, that it was a refusal, and he said, that if Legates being Executors do refuse to prove the Will, yet by the Civil Law they shall have their Legacies. But adjudged by the Court, that if Legates do refuse to prove the Testament, that by the Common Law they have no remedy for their Legacies, for by the refusal there is a dying Intestate, and then nothing could be devised; and also, said, that this writing was a refusal of the Executors, so that the Ordinary might presently commit Administration, and therefore Sir Robert Catlin could take nothing as Legatee.

Pasch. 31 Eliz.

**T**he Array of a Pannell was challenged, because the Sheriff was Cousin to the Plaintiff, and upon a Traverse it was found that they were Cousins, but not in such manner as the Defendant had alleged: and per curiam the Array was quait, for the manner is not material, but whether he be a Cousin, or not, 18 H. 6. 18.

Pasch. 31 Eliz.

**I**t was resolved in the case of Miles against Snowball, that if the Sheriff return one who hath no Freehold, yet he shall be sworn in the Jury, if he be not challenged by the parties: And after upon the objection it was moved, If a woman make a Deed of Feoffment to several persons, of a house and land, wherein she her self inhabiteth, and is seised, and delivers the Deed to the Feoffees, without saying any thing, if this be a good Feoffment: of which Periam doubted, because she did inhabit there all the time, but if it were of other lands on which she did not dwell, and she comes there to make Liberty, and delivers the Deed upon the land and sales no words, yet in this a good Feoffment, because she comes thither to make Liberty.

Anderson, The Feoffment in this case is good, for if she hath an intent to make Liberty, the delivery of the Deed is good Liberty, *Quod Periam & tota Curia concesserunt*, if she had intended to make Liberty, vide Co. lib. 6 26. & lib. 9. 136. Dyer 192.

Pasch.

Pasch. 31 Eliz.

Bond against Richardson.

Willis against Whitewood.

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Pasch. 31 Eliz.

**A** Woman brought an Action of Debt as Administratrix to another, the Defendant pleaded that the Plaintiff was an Alien born in Gaunt, under the obedience of Philip King of Spaine, the Queens enemy. And Walmley moved for the Plaintiff that this was no plea, because that the recovery is to anothers use: but the Court was against him, for the Court will not suffer that any enemy shall take advantage of our Law, and then he moved that that King was no enemy, because Wars were not proclaimed. But Anderson said, that a more open enemy then King Philip cannot be, who had conspired the death of the Queen, and had endeavoured to invade the Realm, and subvert the State: which Windham granted; but Periam hærebat aliquantulum whether he could be called enemy in law before such proclamation. But Walmley said, that the plea was that the woman was born under the obedience of the Emperor, who was in amity with the Queen, and the Court replied, Plead as you will abide by it. *Coke 2<sup>o</sup> 142. pl. 7.*

Pasch. 17 Eliz.

**I**n a trespass of Assault and Battery, the Plaintiff declared to his damages of twenty pounds, and the Jury found for the Plaintiff, and gave thirty pounds damages. And by the Court the Plaintiff shall recover no more then he hath declared for, and this ought to be done, of course by the Clarks, 2 H. 6. 7. 8 H. 6. 4. 42 Ed. 3. 7.

Mich. 30. and 31 Eliz. Rot. 610.

Bond against Richardson.

**I**n Debt, the Defendant pleaded payment at the day, and gave in evidence payment at another day, before the day of payment, and so was it found by the Jury in a speciall Verdict. And Anderson said, We are all agreed that Judgment shall be given against the Plaintiff, for payment before the day, is payment at the day, and Judgment was given that the Plaintiff should be barred. *Coke 142. pl. 5. anoth. al. r. 15 mos. by 221. notes.*

Willis against Whitewood.

**A** Man was seised of lands in Drocage, and made a Lease for years by Paroll, and died, & his wife was Guardian in Drocage to his Son, and the Lessee accepted of a new Lease by Deed of the Guardian in Drocage, and then the Guardian died, and a new Guardian entred, and outed the Lessee; and if the second Guardian could do this, was the question.

Anderson, It cannot be a surrender, for a Guardian hath no Estate that may be surrendered, but it is an extinguishment of the Lease; and

1. *Coke 158.*

If a Woman Guardian in Socage takes Husband, and dies, the Husband shall not be Guardian in Socage.

**Almeskey against Johnson.** **A**

Johnson had a second daughter returned, which was returned A-  
veria eorum, &c. whereupon he prayed a Writ of the Cattle  
of the Plaintiff, and it was granted; and then came the Plaintiff and  
carried the Defendant, his damages and charges, and paid a writ of  
Restitution to have his Cattle again taken to Witherham.

Fleetwood Cattle taken to Witherham are not repletable, but  
then can you have your Cattle, and then we shall not be paid for the  
meat. And the Court said, that the Cattle were not repletable, but  
for satisfaction of damages he shall have restitution of the Cattle, and so  
to the Court, which was confirmed by the Clerks. And Walmesley  
called to H.C. Kebleth to warrant this: And as to the meat, he had the  
use of the Cattle, whereby it was reason he should sustain them: And a  
writ of Restitution was granted.

**Mich. 31, and 31 Eliz.**

In case of a Farmer of White Lincolns Manwood, it was said, that the  
Order called the Cistercians Order, has a privilege that they should  
pay to Tythes for the land that Propriis manibus excolunt: but if  
they let it to Farmers, then they were to pay Tythes, and now comes  
the Statute of Bonasseries 31 H.8. If the Queen should pay Tythes,  
was the question. And it was said, that the Queen, and her Farmers  
also should hold the land discharged of Tythes, as well as the particular  
persons of the Order should, for the King cannot be a Husband, and  
therefore his Farmers shall hold the land discharged so long as the King  
hath the Freehold in him, although he make a lease thereof for years,  
at will, but so if the King sell the land to another, or the reversion to a  
nother, then the Farmers shall pay Tythes.

**Mich. 31 Eliz.**

It was said by the Barons in the case of one Beaumont, that a Debt  
which is not naturally a Debt in it self, but a Debt only by circum-  
stance may be assigned to the Queen. As where a man is bound in a  
Bond to save another's life, and falls thereof, the Obligation  
may be assigned to the Queen. But in such case a present extent shall  
not be awarded but the Process shall be only a Scire facias against the  
party, to see if he hath any thing to plead against it, which note well.

And where a man recovers damages in an Action on the case, parcel  
of the damages cannot be assigned to the King before execution, for he  
must bring a Scire facias upon such Record. And Manwood chief Ba-  
ron held clearly that a moiety hereof could not be assigned other,  
H. 6. 47.



One was invited at *Treafus* at *S. Edmundsbury*, *Coram Justiciariis* ad diversas felonias, &c. audiendas, and after the Judgment made mention of *Bury*, and did not say *prædict.* and by the opinion of the Justice the Judgment was quashed.

Trin. 30. Eliz.

An Action of the Case was brought against one *Gibbert*, for saying that the Plaintiff was a Whore, to a Whore in Southwark, and that he consented her of her money in procuring false witnesses to consent her: And a Verdict found for the Plaintiff. And in Arrest of Judgment it was said, that in the case of *Kerby* it was adjudged that Consenser will not bear Action, and so was it adjudged in this case.

*Mosse against* Reade.

The Defendant called him *Theef*, and then forged a Deed; and a Verdict was found for the Plaintiff: and in Arrest of Judgment, it was said, that *Theef* generally, without saying of what nature specially, will not bear Action. But *Wray* chief Justice denied that, and said that it had of late been adjudged to the contrary; and *Gawdy* against him: But as to the words, that he had forged a Deed, adjudged that the Action will lie, although it be not specially alleged what manner of Deed was forged.

Pasch. 32. Eliz.

*Collings* informed upon the Statute of buying of *Wethers* against *Robert Davyes* and *Stock*: And it was said by *Periam*, that although the words of the Statute be *Pro termino diversorum annorum*, yet if a Lease be made but for one year, yet is it within the penalty of the Statute.

Mich. 31, and 32. Eliz.

*Rippe* brought a *Quare Impedit* against the Bishop of *Canterbury*, and others, and declared upon a Grant of the next avoidance, and the Defendant demanded Oyer of the Deed, and the Plaintiff shewed a Letter which was written by his Father to the true Patron, by which he had writ to his Father that he had given to his Son that the Plaintiff the next avoidance; and upon this there was a Demurr: And the whole Court for the Demurr, for that such Letter was a wackery, so the Grant was not good without Deed: and Judgment was given accordingly.

In Tymbermans Case it was said, that if a Debtor took one in Execution by force of a Capias, although he return not the Debtor, yet an Action of Debt will lie against him upon an escape; and Periam said it had been so adjudged.

Katherine Gilham brought an Execment as Administratrix to her Husband, Quare determino eject. & bona & catalla sua ibidem inventa cepit &c. and a Verdict for the Plaintiff. And it was alleged in Arrest of Judgment, that this word Sua shall not be intended her own Goods, and not the Testators. And the Court was of opinion that Sua shall be intended in such manner as Administratrix, and no otherwise. And therefore Judgment was affirmed.

Mich. 31, and 32 Eliz.

Baldwin against Mortin.

Under the Husband and Wife, habendum to the Husband for thirty years, the Wife shall take nothing thereby, and this case was argued at the Bar and Bench, and was called the Earl of Cumberland's case.

Fleetwood moved that an Action was brought against the Husband and his Wife, and did declare a Trover of the Goods of the Plaintiff by the Wife, which she converted to her own use, and prayed that the Action might be against the Husband only, because that the woman could not convert them to his own use during the Coverture, but only to the Husband's use. And the opinion of the Court was, that the Verdict was good against them both, and that the conversion was in nature of a Trespass, and so the Action would well lie.

Mich. 32. and 33 Eliz.

Kent against Wichall.

If a Trespass Quare clausum fregit & herbam conculcavit, the Defendant pleaded that he tendered sufficient amends to the Plaintiff, and he refused the same, and demanded Judgment, &c. And upon a Demurrer, the opinion of the Court was, that this is no plea in Trespass, but in a Replevin it is a good plea, Sed non dicunt causam diversificari, 21 H.7.30.9 H.7.22.F.N.B.69.G.31 H.4.17.

Drew demanded of the Court, that whereas Edmund Lensage had bound himself in an Obligation by the name of Edward Lensage, if this was good or not; and it seemed to the Court Quod non est factum, and Anderson and Walmesley said expressly that it was void, 34 H.6.19.6.Dyer 279; 21 H.7.8.

Sir John Arrundell and his Wife, brought a Quare Impedit against the Bishop of Gloucester and others, who pleaded in Bar that William Sturton was seised of a Mannor to which the Abbotsdon was appendant, and bound himself in a Statute-merchant of two hundred pounds to one Long, and the Statute was extended, and conveyed the interest of the Statute to one of the Defendants, and then the Church became void: And by the Court the Abbotsdon may be extended, and if it become void during the Connisees Estate, the Connisee may present.

Note, it was said by the Justices of the Common Pleas, that if a man promise another that he shall have a Lease in his land for eight years, or if it is agreed amongst themselves that one shall have a Lease of the others land for eight yeares, that is no lease of the land, but onely a Contract and Agreement, but if one promise another that he shall have his land for eight years, or openly agree that one shall have the others land for eight years, this is a good lease for eight years by force of the agreement.

A. came before the Judges of Lincolne, and acknowledged a Statute-merchant, and the Seal of the Judges was not put to it: and it was adjudged that the Statute was not good, but a man may sue upon it as an Obligation, because the Seal of the party is to it.

### Pasch. 36 Eliz.

If a Waste the Case was, that a Lessee for yeares purchased Trees growing upon the land, and had liberty to cut them within eighty yeares, and after the said Lessee purchased the inheritance of the land and devised it to his Wife for life, the Remainder to the Plaintiff in fee, and made his Wife Executrix, and died, who after married with the Defendant, who cuts the Trees, whereupon the Action is brought. And by opinion of all the Court the Action was maintainable, for although the Trees were once Chattels, yet by the purchase of the Inheritance they were united to the land: and Judgment was given for the Plaintiff accordingly.

### Pasch. 36 Eliz.

Upon an Exigent, the Sheriff returned, that after Divine Service he made proclamation, and did not say, that there was no Sermon: and therefore the Judges held that the return was not good; for by the Statute, if there be a Sermon in the Church, the Sheriff shall make his proclamations after the Sermon, and if there be no Sermon, then after Divine Service: and because it did not appear whether there were any Sermon or not, the opinion of the Court was ut supra.

It was said that a man shall not aver against a Postea in the Kings Bench, or the Common Pleas, to say that it was contrary to the Verdict, nor shall he be received to say, that the Judges gave a Judgment,



and the Clerks have entred it contrary to their Indement: but otherwise it is in Court Barons, or other base Courts, not Courts of Record, 10 Ed. 3. 40.

35, and 36 Eliz.

### Newman against Beaumont.

If the Ordinary grants the Administration of the Goods of B. to A. and after grants the Administration to R. this second Grant is an appeal of the first, without any further sentence of repeal, for the Administrator is but a servant to the Ordinary, whom he may charge at any time.

In an Action of Debt on a Bond bearing date the ninth of July, the Defendant pleaded a Release of all Actions the same day, usque diem dati ejusdem scripti, and it was adjudged that the Obligation was not discharged, because the Release does exclude the ninth day on which it was made.

Mich. 37, and 38 Eliz. Rot. 211.

### Holman against Collins.

Holman brought a Writ of Error against Collins, upon a Judgment given in the Court of Plymouth, in the County of Devon, the case was;

Collins was possessed of a peece of Ordnance, and in Consideration that he would tender this to Holman for to put into his Ship which was then going to Sea, and that Collins would stand to the hazard of losing it: The said Holman did assume upon himself, and did promise to give Collins certain Goods which he should gain by the Voyage, and after the said Ship did return laden with certain Goods, and for non-satisfaction the said Collins brought his Action on the Assumpsit, and had Judgment to recover. And Crook assigned these Errors;

1. That the Stile of the Court was not good, for it was Curia Domina Regina Burgi predicti, tunc coram Majori de Plymouth, without saying, secundum consuetudinem villæ predictæ. and he who is Judge of the Court, ought to be either by Patent or Prescription, and then for not expressing the Stile of the Court, nor by what authority they held their Court, it is error; and he cited the case in the 10th Dyer 262. and a Judgment, 30 Eliz. Rot. 32. given in the very point: Another Error was, that no day was pressed for the Defendant to appear, but generally ad proximam curiam, which is Error, although it be held every Monday. And for these Errors Judgment was reversed.

Trin.

Trin. 28 Eliz. Rot. 948.

Mercer against Sparks.

**M**ercer had Judgment to recover against Sparks in the Common Pleas, upon an Action of the Case for words; and Sparks brought a Writ of Error in the Kings Bench, and assigned for Error, that the Plaintiff did not express in the Declaration that the Defendant spoke the words maliciously, but it was adjudged, that it was no Error, because the words themselves were malicious and slanderous, wherefore Judgment was affirmed.

Savacres Case.

**I**t was adjudged in the Common Pleas, that if a Baron, or others mentioned in the Statute of 21 H. 8. take divers Chaplains which have many benefices, and after they discharge their Chaplains from their Service, they shall retain their Benefices during their lives, and if the Baron takes others to be his Chaplains, they cannot take many Benefices during the lives of the others, which are beneficed and discharged of their Services; for if the Law were otherwise, the Lords might make any capable of holding Benefices by admitting them to be their Chaplains.

In an Action of false Imprisonment brought against the Mayor, Citizens, Sheriffs and Commonalty of Norwich; it was moved where the Issue should be tried: And by the Court the Issue shall not be tried there; and in the same case it was moved, whether the Sheriff could summon himself, and it was answered by the Court that he could not: and Periam said that so it had been after adjudged.

Mich. 29. and 30 Eliz.

**I**n an Abowry adjudged by the Court (Anderson being absent) that in an Abowry it is sufficient for the Abowant to say, Son Franktenement, but if the Plaintiff traverses it, it is no plea without he makes to him a Title, & that is the difference of pleading Son Franktenement, on the part of the Abowant, and on the part of the Plaintiff. And Welford said, that so were all the Presidents, that it is no plea to traverse the Bar in the Abowry, without making Title: And Periam said, that it is no Title to plead De son seisin demesne, but he must make out his Title Paramount, his Seisin Demesne.

Mich.

Mich. 29, and 30 Eliz.

Blofs against Holman.

**J**ohn Blofs brought an Action of Trespasse Quare vi & armis, for taking of his Goods, against Holman, and the Defendant pleaded not guilty, and the Jury gave a speciall Verdict, viz. That the Plaintiff at the time of the Trespasse was of the Mystery of the Percers, and that at that time the Defendant was his Servant, and put in trust to sell his Goods and Merchandizes in Shopa sua, ibidem de tempore in tempus, and that he took the Goods of the Plaintiff named in the Declaration, and carried them away, and prayed the advice of the Court, if the Defendant were culpable or not; and upon the Postea returned, Shuttleworth prayed Judgment for the Plaintiff. And the doubt was because the Declaration was Quare vi & armis, because it appeared that the Defendant had custody of the Goods: but Shuttleworth doubted whether he had Custody, and cited the case of Littleton, viz. If I give my Sheep to Compasture, &c. and he kills them, an Action of trespass lies: and the Justices held that in this case the Action did well lye; and Periam said, that the Defendant had onely an authority, and not custody or possession, and Judgment was given for the Plaintiff, 3 H. 7. 12. 21 H. 7. 14. And Windham said, that if he had imbezelled his Masters Goods, without question it was felony. Quod fuit concessum, (Anderson absente) and the Law will not presume that the goods were out of the possession of the Plaintiff; and the next day came the Lord Anderson and rehear sed the case, and said, that the Defendant had neither generall nor speciall property in the Goods, for it is plaine, he could have no generall property, and speciall he had not, for he could not have an action of Trespasse if they were taken away, then if he had no property, a trespass lies against him, if he take them; so if a Shepheard steal Sheep, it is felony, for he hath no property in them, wherefore he gave Judgment accordingly.

Mich. 29, and 30 Eliz. Rot. 1410.

Cooke against Baldwin.

**A** Lease was made for one and twenty years, to one Truepenny and Elizabeth, if she, and he, or any Child, or Children between them lawfully begotten, should so long live, and then they were married, and the Wife died without Issue. If the Lease be determined or not, was the question. And it was moved that it was determined, because it is conjunctive, if he and she, &c. and now one of them is dead without issue, and it is not like the case of Chapman, where a man covenants to enfeoff one and his Heires, for it is impossible to enfeoff his Heires, he living, and therefore in that case it shall be taken for a disjunctive: and if I make a Lease for years to two, if one of them dye, the other shall have all, because they take by way of interest; but if a Lease be made to two, during the life of one of them, if one dye, the

Lease



Lease is gone. Quod fuit concessum : And here the meaning is, that the Lease shall be determined if one of them dye.

Rhodes Justice, The meaning is against you, for by the word (or) which comes after, it appears that they are to have their lives in it.

Anderson, By the words it is plain, that after the death of one the Lease is determined, and that which moves me to think it was so intended, is, because it was intended (as it seems to me) to be a Jointure for the wife, which was made by them before marriage; and then if by the death of one it should be gone, and he have nothing, could not be the meaning; To which the other Justices assented. And all the Judges agreed that the Lease was not determined by the death of one; and Judgment given accordingly.

● Mich. 29, and 30 Eliz.

**I**n a Quare Impedit by Sir Thomas Gorge Knight, against the Bishop of Lincoln, and Dalton Incumbent, the Case was; That a Hannon with the Advowson appendant was in the hands of the King, and the Church became void, and the King grants the Hannon with the Advowson: If the Grantee shall have the Presentation; or the King, was the question. And all the Justices held clearly that the advowance would not pass, because it was a Chattell vested. And Periam said, that in case of a common person without question an Advowson appendant would not pass by such Grant; for if the Father dye, it shall go to his Executors, but if it be an Advowson in gross in case of a common person, there is some doubt: But in the principall case all the Judges held ut supra, and said, that so it was in 9 Ed. 3. 26. Quare Impedit 3 r. And in Dyer in the case of the Church of Westminster, but F. N. B. is contrary, 33 N.

Mich. 29, and 30 Eliz. Rot. 728.

**H**ouse and Elkin brought an Action of Debt upon an Obligation made to them, against Roger Grindon, as Sheriffs of London, upon condition of appearance at a certain day in the Kings Bench: The Defendant pleaded that he being arrested by a Precept out of the Kings Bench appeared at the day: And upon this they were at issue to be tried by the Country: And a Repleader was awarded, because it was triable by Record, for although the Sheriff do not return the Process, yet the Defendant ought to come into the Court at the day, and there spect-ally entry shall be made of his appearance. And so was it adjudged this terme in the Case between Bret and Shephard: But Bradford Prothonotary said it was well enough, for it may be that he appeared there, and there was no Record of it, To which it was answered, that it was no appearance unless there were a Record: But the Case in Court was ut supra.

## Hil. 30. Eliz.

**I**n an Ejectment by Dorothy Michell against Edmund Duntun, the Case was; A woman makes a Lease for years, rendering Rent, with a Covenant that the Lessee should repair the house, with other Covenants, and then devised the same lands to the same Lessee for divers years more, yielding the like rent, and under such Covenants as were in the first Lease, the Remainder over in fee, and dies, and then the first Lease for years does expire, and the Lessee continues in by force of the second Lease by virtue of the devise, and repairs not the houses, so that if the first Lease had been in being, he had broke the Covenant. If this shall be such condition as he in the remainder may enter, was the question.

Shuttleworth, It is a Condition, for he cannot have a Covenant, and then it shall be intended that it is conditionall: But by all the Court, There appears no such intent, for it appears that he holds under like Covenants.

Anderfon, The nature of a Covenant is to have an Action, but not an entry, and therefore there shall be no entry.

Shuttleworth, To what end then serves these words (under like Covenants) Periam, They are void. And at last it was resolved by all the Justices, that the Will expressing that the first Lessee should have the Land observing the first Covenants, it shall not be now taken to be a Condition by any intent that may be collected out of the Will: for a Covenant and Condition are of severall natures, the one giving Action, the other entry, and here the intent of the Will was, that although the Covenants were not performed, yet the Lessee should not forfeit his terme, but is onely bound to such paines as he was at the beginning, and that was to render damages in an Action of Covenant. And Judgment was given that the Plaintiff should be barred.

## Mich, 29, and 30 Eliz. Rot. 2449.

**T**he Earle of Kent brought an Action of Debt upon a Bond against William Bryan, which was indorset with a Condition, That if the Defendant did permit the Plaintiff, his Executors or Assignes, not onely to thresh Corn in the Defendants Barn, but also to carry it away from time to time, and at all times hereafter convenient, with free egress and regress, or else to pay eight pounds upon request, &c. that then, &c. And in truth the Defendant permitted the Corn to lye there two years, in which time the Mice and Rats had devoured a great part of it, and then the Defendant threshed it, and the Earle therefore brought this Action: And upon Demur it seemed to Walmesley that there was no forfeiture of the Bond, because the Earle took not the Corn away in convenient time, for convenient time is such as shall prejudice no person (Quod fuit negatum per Justiciar.) and here is great prejudice to the Defendant, because the Plaintiff did not carry away the Corn: And he put many cases, where things ought to be done in convenient time, as in the 21 Ed. 4. where an Arbitrement ought to be performed in convenient time. But the opinion of the Court was, that he might come in convenient time, although he comes long after, and the

the words are not within convenient time. Windham said, That if the words had been within convenient time, it would have made a difference.

Anderfon, If the words of the Condition had been, that he should suffer the Plaintiff in time convenient to come, and thersy and take away his Corn, then perhaps he ought to send within a year according to Walmleys saying, but the words here are at all convenient times, and that day that the Merchant came was a convenient day to thersy and carry away, and the words, At all convenient times shall be construed, that at any time when it pleaseth the Earl he may come, unless it be night, or Sabbath day, and if the word, convenient, had not been mentioned, then by the words, from time to time, and at all times after, then the Earl may come at any time either in the day or night, and that a hundred years after as he pleaseth, and then the word, convenient, does restrain him that he cannot come but in the working days, but does not restrain any time in which he shall come, but onely in convenience of time, which is at times of labouring and watching. And so was the opinion of the Court. ut supra.

An Action of Debt was brought upon a Lease for years, the Defendant pleaded Nihil debet per patriam, and did intend to give in evidence an entry of the Plaintiff before any Rent behind. And by the Court he could not do it, for it is contrary to the issue.

Hil. 30 Eliz. Rot. 904.

Between Spittle and Davis.

**I**n a Writ of Right, the case was, One Turk seised of lands in fee, devised parcell thereof to his eldest Son in tail, and the other parcell to his youngest Son in fee. Provided, and his intent was, that if any of his Sons or any of their Issues, do alien or demise any of the said lands, before any of them comes to the age of thirty years, that then the other shall have the Estate, and does not limit what Estate, and then one of the Sons makes a Lease for years before such age, whereupon the eldest enters, and before he comes to the age of thirty years, he alien that part into which he made entry, and the other brother being the eldest enters and makes a Lease to Spittle the Plaintiff for three years, and Davies by commandment of the younger brother enters, and takes the house Damage-sefant, and Spittle brought a Writ of Right: And upon Demur, it seemed to the Court, that this was a limitation, and by virtue of the Will the Estate devised to them untill they aliened, and upon the alienation to go to the other, & upon such alienation the land is discharged of all limitations, for otherwise the land upon one alienation shall go to one, and upon another alienation shall go back again, and so to and fro ad infinitum, vide Dyer 14. & 29. And afterwards all the Judges agreed, that after one brother had entred into the land by reason of the alienation, that land was discharged forever of the limitation by the Will, And Judgment was given accordingly.



Trin. 27 Eliz. Rot. 190.

## Carter against Lowe.

**I**n an Executment, the Case was, A Testator devised his terme to J.S. and made his Wife Executrix and died, the Woman enters and proves the Will, and takes Husband, who takes a Lease of the Lessor, and after the Devisee enters and grants all his Estate to the Husband and wife, and herein two questions were moved.

1. If by this acceptance of the new Lease by the Husband, the term which the woman had to another use, viz. to the use of the Testator shall be deemed a surrender. And the opinion of the Court was clearly without argument, that it was a surrender. But admitting it was no surrender, but the first terme continues, then the second question is,

2. If when the Devisee enters into the terme devised to him, without consent of the Executrix, by which entry he is a wrongfull Seisior, and a Disseisor, and after he grants his right and interest to the Executrix; if this Grant be good or no, because he had not any terme in him, but only a right to the terme suspended in the land, and to be released by the entry of the Executrix. And adjudged that it was a good Grant, and it shall inure first as the agreement of the Executrix by the acceptance of the Grant, that the Devisee had a terme in him as a Legacy. And secondly the Deed shall have operation by way of Grant to pass the Estate of the Devisee to the Executrix, and so no wrong, and the case was resembled to the case of surrender to the grantee of a Reversion, which first shall inure as an attornment, and after as surrender, and so was it adjudged.

Trin. 37 Eliz.

**I**n an Action on the Case for these words, Carter is a priggish pilfering Merchant, and hath pilfered away my Corne and my Goods from my Wife and my Servants, and this I will stand to: And the Action was commenced in a balle Court in the Country, and Judgment given and the Record removed by writ of Error: And it seemed to the Court that the words were not actionable, wherefore Judgment was reversed. Sed quare rationem.

## Gowood against Binkes.

**A** man did assume and promise to I.S. in consideration that he would forbear a Debt due to him untill such a time: That he would pay the Debt if A.B. did not pay it, and he that made the promise died, and the money was not paid, and therefore an Action was brought against his Executors, who traversed the Assumpsit, and a Verdict found against

against them; and in Arrears of Judgment it was moved, that an Action on Bonds in a simple Contract, lies not against Executors, unless upon an Assumpsit for a Debt; Duty owing by the Testator himself, and not of such a collateral matter as the satisfaction of the Debt of another; but by Gawdy's Judgment was given for the Plaintiff; whereupon Popham said, that he believed this Judgment would be reversed by writ of Error in the Exchequer Chamber; and the same day at Serjeants-Inn such a case was depending in the Exchequer Chamber to be argued, and reversed for the cause *ut supra*. And the case was between Jordan and Harvey, and entered Trin. 36 Eliz. Rot. 384.

Hil. 8 Eliz. Rot. 40.

Hil. 37 Eliz. Rot. 34.

Castleman against Hobbs.

**I**F an Action of the Case for Tying, Thou hast stolen half an acre of Corn, (invenendo) Corn seised, the Defendant demurred upon the Declaration.

Fenner, It is not Felony to mow Graine and take it away.

Popham agreed to it, and that the word *Invenendo* would not alter the Case, unless the precedent words had dependent presumption, the Coyne was seised, and by this we may think that the Coyne was seised, when the words are, half an acre of Coyne: on the contrary, if the words had been, that he had stolen so many loads, or bushels of Coyne; And Gawdy was of the same opinion: and Judgment against the Plaintiff, &c.

Hil. 38 Eliz.

**I**F an Account the Plaintiff declared, that he delivered Goods to the Defendant to Merchandise for him, the Defendant said, that the Goods with divers other of his own proper goods were taken at Sea, where he was robbed of them. And it was moved that this was no plea in Bar of an Account, but if it be any plea, it shall be a plea before Auditors in discharge: But admitting it be a good Bar, yet it is not well pleaded, for the Plaintiff as it is pleaded cannot traverse the robbing and try it, for things done *super altum mare* is not tryable here, wherefore the Defendant ought to have pleaded that he was robbed at London, or any other certain place upon the Land, and maintain it by proofs that he was robbed on the Sea.

Gawdy, It is no good plea, for he hath confessed himself to be accountable by the receipt, 9 Ed. 4. and it is no plea before Auditors, no more then the Case was in 9 Ed. 4. for a Carrier to say, that he was robbed.

Popham, It is a good plea before Auditors, and there is a difference between Carriers and other Servants and Factors; for Carriers are paid for their carriage, and take upon them safely to carry and deliver the things received.

¶

Gawdy,

Gawdy, If Kneels took a Poſſion, ſuborned the Wiſſemore alſo, yet the Dealer ſhall be reſponſible for them, as it is in the 23 H. 6. Popham. In that caſe the Dealer both ſuſtains and ſuffers againſt the Heir, but there is no remedy other in law, only in Equity. Gawdy, When the Heir ſuſtains it is when the Feoffment is made by Deeds, and when he ſuffers. Popham, There is no difference.

Hil. 38 Eliz. Rot. 40.

**I**n a writ of Error upon a Judgment given in Nottingham, the Error assigned was; because the Defendant had no addition, for it appeared the Action was in Debt; and the Record was, that H. Hund complained against Richard Preston of, &c. in the County of Nottingham, Husbandman, the which addition is not in his first name, but in the alias, and that could not be good, and therefore it was prayed that Judgment might be reversed: But by the Court, the Court of Nottingham had no authority to entitle any person, so that addition is not requisite, wherefore it is no Error: and Judgment was affirmed.

Trin. 37 Eliz. Rot. 353.

Browne against Brinkley.

**I**n an Action of the Case for words; the Declaration was, That the Plaintiff was produced as a Witness before the Justices at the Assizes at Darby, where he deposed in a certain cause, and the Defendant said, Browne was disproved before the Justices of Assize at Darby, because Mr. Kingsley (Invenudo) that he was disproved in his Oath, that he took before the Justices: And adjudged against the Plaintiff, for although he was disproved in his Oath, yet it is not actionable in this case, for that disproval might be in any collateral matter, or any circumstance; but otherwise if the words had been that he was perjured, and the (Invenudo) will not help the matter, and so was it adjudged. The chief Justice and Fenner being only in the Court.

Trin. 36 Eliz.

Higham against Beaf.

**I**n an Action of Trespass by the Parson of Wickhambrooke in the County of Suffolk, against the Vicar of the same place, for taking of Tythes, and on the general issue the Jury gave this speciall Verdict: That the place where, &c. was a place called B. the Freehold of I. S. and parcel of the Mannor of Radmanstall, and found that the Pope as



Willoughby against  
Gray.

99

Andreas Dymary, heretofore made such an Indentment to the Vicar-  
ring out these words: Volentes quod Vicarius, &c. habebit decem par-  
tem decem annorum Madonam &c. Regni quomodoconque perveritatem de  
moreris de Radmanshall, and the question was, if the Vicar by this  
Indentment, shall have the third part of the tithes growing upon the  
Barn of the Freeholders within the Parsonage, as well as the tithes of the  
by the Court: that a Vicar cannot be without Freeholders, and in-  
asmuch as they are to be charged with the payment of Tithes, one and  
the other together shall be said to be the Tithes of the Parsonage, and so  
it was adjudged that the Vicar should have Tithes of the third part  
of the land of the Freeholders, as well of the Demesnes, and Copyhol-  
ders.

Trin. 37 Eliz. Rot. 438.

Willoughby against Gray.

**A** Vicar facias did hear Teste out of the Term, and also there was  
no place mentioned in the Will, here the Vicar should be im-  
pannelled, and after the Will it said Coram Iudiciis, and did not say  
apud Westmonasterium, and a tryall was had hereupon, and Judg-  
ment given which was prayed might be reversed for these causes. But  
it seemed to the Court, that notwithstanding all that was alledged, it  
was good enough, for although the Venire facias was not good, yet if  
the Distringas had a certain return and place therein: And the Jury ap-  
peared and gave their Verdict, so that a Verdict was had, the Statute  
will aide the other defects: as in the case adjudged between Marth and  
Bulford, where the Venire bore Teste out of the Term. But Fenner said,  
that the Teste was in the Term but on the Wednesday, which was not  
Dies Juridicus.

Trin. 38 Eliz. Rot. 622.

**K**inton brought an Appeal of Mayhem, against Hopton, Flam, and  
Williams, Hopton pleaded, not guilty; Flam pleaded that he was  
not a man, and demanded Judgment, &c. Et quoad feloniam & mahemi-  
um, not guilty, & de hoc ponit se super patriam, & prædict. Kinton simi-  
liter: And Williams pleaded, no such man in rerum natura, as Flam,  
and demanded Judgment of the Will, and as to the Mayhem and Fe-  
lony, not guilty, Et de hoc ponit se super patriam, &c. And as to the other  
two pleas to the Will, Kinton demurred, & prayed that the Will might  
be awarded him, and a Venire facias to try the issue. For Tanfeild ur-  
ged, that by pleading over to the felony, he waived the plea to the Will,  
for there was a diversity between an appeal of Murder, and of May-  
hem, for in Murder, as it is 7 Ed. 4. and 3 Ed. 6. although he plead to  
the Will of appeal, yet of necessity he must plead over to the Murder,  
because it is in diversis vicis, as also if he will fight in Westmister upon  
the plea to the Will, he hath waived thereupon the Felony, and  
therefore he must plead over, not guilty. But in Mayhem it is other-  
wise.

Grays Eliz. 193. pl. 14.





also of land in the other Townes, do let all his land in Standish onely, his land within the Town of Standish both passe, and not all his land within the Parish of Standish in the other Townes. For where a man speaks of Standish or of Dale, it shal be intended to be a Town and not a Parish, unless there be expresse mention of the Parish of Standish, or of Dale. Gawdy and Fenner on the contrary, for the Grant of every man shal be taken strongest against himself, and therefore all the land as well within the Parish of Standish, as within the Town of Standish shal passe: And Fenner said, that when Dale is mentioned in any Precept, it shal be intended the Town of Dale, because Towns are noted at the Common Law, and not Parishes, for Parishes were obtained by the Council of Lyons, but notwithstanding in Grants, there shal be no such intendment, but the intendment shal be according to the common usage and understanding of the Country, and Country men in favour of the Grantee: and when a man speaks of Standish, or any such place, it shal as well be intended to be a Parish as a Town.

Hil. 19, Eliz.

Clarentius against Dethick.

Clarentius brought an Action of the Case against Dethick, by the name of Dethick, alias Garter: The Defendant demanded Judgment of the Writ, for the Queen by her Letters Patents had created him King at Armes, Et quod nuncuparetur Garter principalis Rex armorum, and that he should sue and be sued by such name, and because he was not sued according to his creation, he demanded Judgment, &c.

Tanfield prayed that the Writ might abate, for this case had been here in the Court in question before, where Dethick was indicted by the name of Dethick onely, and because he was not named according to his creation, he pleaded that matter, and the Indictment was quashed.

Gawdy, I remember the case very well, and it was adjudged at my first coming to this Court, and in truth the Judgment passed against my opinion, which then and still is, that when he is sued as King at Armes, in such case wherein his Office or other thing belonging to his Office comes in question, then he ought to be named according to his Patent, but when he is sued as I.S. then it is sufficient to name him by his proper name.

Popham, Upon the creation of any Deanery which is obtained and granted by Patent of the King, the Dean shall sue and be sued by the name of Dean of such a place, yet if such Dean both sue or is sued about any matter concerning his naturall capacity, it is not necessary to name him Dean. Fenner. But this is a name of dignity, and by his installation is made parcell of his name, and if a man be made a Knight, in all Actions he shall be so named; wherefore it seemed to him that the Writ ought to abate. Et Adjournatur.

Hil. 17 Eliz.

Hugo against Paine.

Hugo brought a Writ of Error against Paine, upon a Judgment given in the Common Pleas upon a Verdict, the Error assigned was,

That

That



Rainer against  
Grimston.Chandler against  
Grills.During against  
Kettle.

That one Tippet was returned in the Venire facias, but in the Habeas Corpus and the Distringas he was named Tipper, and to another person then was named in the Venire facias the issue. Curia, Criminis what person was summoned, and what was his true name, to which it was answered that his name was Tippet according to the Venire facias, and that he was summoned to appear to be of the Jury, and he took his oath in the same place where Tipper was named, and that no such man as Tipper inhabited there, and therefore it was awarded by the Court that the Habeas Corpus and Distringas should be amended, and his true name put in, and Judgment was affirmed, &c.

Hil. 38 Eliz. Rot. 944.

Rainer against Grimston.

**R**ainer brought an Action of the case against Grimston in the Kings Bench, for these words, He was perjured, and I will prove him so by two Witnesses; without speaking in what Court he was perjured, and the Plaintiff had Judgment, and upon Error brought by the Defendant, it was moved that the words were not actionable: But in the Erchequer Chamber, the first Judgment was affirmed.

Hil. 39, Eliz. Rot. 859.

Chandler against Grills.

**I**n a Trepass, the parties were at issue, and a Venire facias was awarded on the Roll returnable Octabis Trinitatis, and the Venire was made six dales after the day of Octabis returnable at a day out of the term, and the Distringas was made; and the Jury Impanelled, and a Verdict and Judgment for the Plaintiff: And in a Writ of Error brought this matter was assigned, and the first Judgment affirmed, for this is aided by the Statute, being it is the default of the Clerk: and the case was cited between Thorne and Fulshaw in the Erchequer Chamber, Mich. 38, & 39 Eliz. where the Roll being viewed, and the Venire not good, it was amended and made according to the Roll, being that which warrants it and is the act of the Court, and the other matter but the mistake of the Clerk. But if the Roll were had right then it is erroneous, because the Venire is without warrant, and no Record to uphold it, and so was it held in the case of Water, Hungerford and Besie.

Hil. 39 Eliz.

During against Kettle.

**D**uring brought an Action against Kettle after a Trepass by Verdict in London, and in Arrest of Judgment, it was alledged, that the Venire facias is, Regina vice comit. London salut. precipimus tibi quod, &c. where it should be precipimus vobis, &c. But ruled by the Court that this Venire being as it were a Judicial Writ, it that ought to endue the other proceedings, it was holden to be amendable, and so it was accordingly.

Pasch. 39 Eliz.

East against Harding.

**I**t was moved, Whether if a Lord of a Manor makes a Lease for years, after a Copyholder commits a Forfeiture, the Lessee for years shall take advantage hereof: and it was said by Popham, that the Lessee of a Lease shall have advantage of all Forfeitures belonging to Land, as in case of Feoffment, and the like, but on the contrary for not being of Fealty.

Mich. 39 Eliz.

Collins against Willes. Brok. 774

**T**he father makes a promise to Willes, that if he would marry his Daughter, to pay him 80 l. for her portion, but Willes demanded a 100 l. by the wife's refusal to marry her, whereupon the daughter prayed her father to pay the 100 l. and in consideration thereof he did assure him to pay him 20 l. back again. The 100 l. is paid, and the marriage took effect. And the father brought his Action on the case against the Husband and Wife, for the 20 l. Gawdy, and Fenner said, that the Action would lie: but Popham held the consideration void.

Mich. 39, and 40 Eliz.

Penn against Merivall.

**I**f an Escheator the Case was, If a Copyholder makes a Lease for years which is a Forfeiture at the Common Law, and after the Lord of a Manor makes a Feoffment, or a Lease for years of the Freehold of this Copyhold to another; if the Feoffee or Lessee shall take advantage hereof was the question. Popham, He shall not, for the lease of the Freehold made by the Lord before entry, is an assent that the Lessee of the Copyholder shall continue his Estate, and so is in nature of an affirmation and confirmation of the Lease: To which Clench and Fenner agreed; and therefore upon motion made by Yelverton Serjeant, and Speaker of the Parliament, Judgment was given, Quod querens nihil capiat per Billam.

Mich. 6 Eliz.

**O**ne enters a plaint in a base Court to pursue in the nature of a writ of entry in the Port, and had summons against the party until such a day, at which time, and after sunset, the defendant came and told the Court, and the summons was returned for void, and the party made default, and Judgment given: the question was, If the Judgment was good. Byer, Webb, and Benlowes held the Judgment good, although the Court was held at night: and Byer said, that if it were otherwise, he could have no reliance by writ of false Judgment, nor otherwise, but only by way of petition to the Lord, and he ought in such case to do right according to conscience, for he hath power as a Chancellor within his own Court.

Lane

## Lane against Coups.

**I**n an Ejectment by John Lane against Coup, and the Plaintiff declared on a Lease made by William Humpheson, the Case was; William Humpheson being seised of land in fee, suffered a common recovery to the use of himself and his wife for life, the remainder Seniori puero de corpore Gulielmi Humpheson, and to the Heirs Males of the body dicti senioris pueri. Plowden, One point is, that when a remainder is limited Seniori puero in tail, if Puer shall be intended a Son, or a Daughter also; and methinks it shall be intended a Son only, for so are the words in common and usual speech, and words in Writs ought to be expounded as they are commonly taken, and not to go to any other construction of the words as (Heirs) in the Latine is used also for goods by the Civil Law, but we use it only for lands, and so Libra in Latine signifies a Weight; and yet if I am bound in Viginti Libris, if I sell my Bond, I must pay money, and not Lead, or the like. And so the word Puer is sometimes taken for a servant. Claudius jam rivos pueri, &c. and the same reason that it may be intended for a Daughter, may be for a servant also. Gawdy, I suppose the Son shall have it and not the Daughter, for although Pueri was taken for Males and Females, yet now it is taken for Male in any Modern Author, but to omit curiosity of words, we ought to consider rather the intent of the parties, and there are many circumstances to prove that he intended this to his Son, and not to his Daughter, for he made it for settling his Inheritance, and it shall not be supposed that he intended his Daughter should have it. Also where the case may be taken two ways, the most usual shall be intended; as in case of a reservation of a Rent at Michaelmas, that shall be intended at the chiefest Feast: also in this case it shall be intended that he would advance the most worthy of his blood, and therefore to that purpose the conveyance shall be expounded; for if there be two I. S. and I give land to I. S. it shall be intended to my next Neighbour, but if one be my Cousin, although he dwelle forty miles from me, yet he shall have the land: And to this Southcote accords.

31 Eliz. in B. R.

Hone against Clerk.

**A** Woman Lessee for life takes Husband, who by Indenture makes a feoffment of the land to I. S. for these words: Sciatis per Servantes Richardum How & Katherin. uxorem ejus dedisse I. S. unum messuagium habendum prædicti I. S. heredibus suis ad solum opus & usum of the said I. S. and his Heirs, during the life of Katherine. The question was, if this was a feoffment because the wife was Tenant for life; and the Attorney argued that it was, for the words Pro termino vite Katherine are referred to the use only and not to the estate; for by these words habendum to him and his Heirs the estate is limited, and therefore it is a feoffment; but after comes the limitation of the use, ad usum I. S. and his Heirs during the life of the woman; and after the death of the woman the use remains in the Feoffment; and he cited the Lord Sturton's case. In the beginning of the Queens Reign; The Lord Sturton gave land to Clerk and his Heirs, to the use of Clerk and the Heirs of his body, and avouched that it was not an estate in tail, for the limitation of the estate was before in the Premises. Coke, on the contrary, and



said, that these words, For life of the wife, are to be referred to the limitation of the Estate, for if a double sense be in words, such sense shall be taken as shall bring all to one, and therefore it shall not be so expounded, as that the Grant shall not take effect, and that a forfeiture shall ensue. 4 Ed. 2. and see a notable case for opposition of words, and for relation of words and sentences, 34 Ed. 3. Avowry 38. 28 H. 8. Dyer. Gawdy, It is a forfeiture. Clench said he would abide; but afterwards it was adjudged a forfeiture: for as Wray said, the estate given was forfeit.

**Mich. 36. & 37. Eliz. Bagnall against Porter in B. R. I Rot. 353.**

**A** Bargainor bargaineth and sells his land, and if the Bargainor pay 10s. for such a day, that then he shall be seized to the use of the Bargainor and his heirs, and his assent to make such assurance for the security of the land as should be advised by the Council of the Bargainor, and the Bargainor should himself in a Recognizance to performe the said Covenant, and in debt upon the Recognizance, it was holden that the Bargainor paid the money at the day, and had tendered to the Bargainee a Deed in which was comprised an acquittance of payment of the money, and also a release of all his right, and the Bargainee refused to seal it. Coke was of clear opinion that he ought to have sealed it, for it is necessary to have the Deed to mention payment of the money, for otherwise the Bargainee and his heirs may claim the land for default of payment. Gawdy of the same opinion, and cited 19 Ed. 4. Popham, The case is not so clear, for if he had tendered an acquittance only, there is no doubt but the Bargainor might refuse to seal it, and by the same reason he may refuse when it is joyned to a thing that he is bound not to do, viz. to seal the release: but at last the matter was referred to Arbitration.

**Hillar. 37. Eliz.**

**C**oke demanded this question, A man having two Daughters his Heires, does demise his Land to them in Fee, What estate had they by this Demise? For if a man deviseth Land to his eldest Son, it is voyd, and he is in by descent. That it was holden by the Court, that they shall hold by the Devise, because that he gives another estate to them then descended, for by the descent each of them had a distinct moiety, but by the Devise they are Joynt-tenants, and the survivor shall have all. And Fenner sayd, If a man had Land in Burrow-English and Guildable Lands, and devised all his Land to his two Sons, and dyes, both of them shall take joyntly, and the younger shall not have a distinct moiety in the Burrow-English, nor the elder in the Guildable Land, but they are both Joynt-tenants.

**Pasch. 37. Eliz. Carrell against Read, in B. R. Rot. 270. Erke Eliz.**

**A** Lease for years was made of divers fenny grounds in Cambridge sh. and the Lessee covenanted to defend the ground, for being surrounded with water, and to drain the water out of other lands that were damaged to him in the said County. And upon an Action of Covenant for not performing, the Defendant pleaded that the Plaintiff had entered in the land demised. And adjudged no plea by the Court, because the Covenant was not in respect that the Lessee should enjoy the land, nor was it a Covenant adhering to the land, but to a collateral thing, but if it had been in respect of enjoying the land, there it is a good plea to say that the Plaintiff had entered.

tree, but where the thing to be done is collateral, it is otherwise, and also if he do plead such plea, yet it is not a bar, unless he bring plea out of possession, Coke lib. 3. 221. 4 Ed. 3. 29. the Law shall not have a Cessavit after entry in parcel, 10 Ed. 4. 113. 5 H. 6. Bar. 16. 19 Ed. 4. 2.

Trin. 37 Eliz. in B.R. Rot. 4076.

Dogrell against Perks.

**I**n an Action of Covenant, The Defendant pleaded, that it was enacted by the Mayor of London, and common Council, that if any Citizen takes the Son of an Alien to be his Apprentice, that the Covenantants and Obligations shall be void, and he shewed that he was the Son of an Alien, and became an Apprentice to the Plaintiff who is a Citizen, and made the Covenant with him for his Apprenticeship, And demanded Judgment, And it was held no Bar, for notwithstanding the Act, the Covenant is good, for it is the Act of the Defendant, although the Act of the Common Council be against it: but the said Act may induce punishment on any Citizen that breakes it. And Judgment was given for the Plaintiff.

Trin. 41 Eliz. in B.R.

Knotts against Everstead.

**L**esse for life, the remainder for life, the remainder in fee: he in the Reversion who had the fee does enter and enfeoff the Lessee for years; and shewed that by this Feoffment Nihil operatur. Popham said, that he who hath a term cannot license another that hath nothing in the land to make a Feoffment, for he who hath the Freehold wants nothing but possession to make a good Libery: but in this case he who makes the Libery had not the Freehold, and therefore the license is void. But Tanfeild said, that if a Lessee for life gives leave to a stranger to make a Libery, it is void, but if he consent that the stranger shall make a Feoffment, it shall amount to a Disseisin, and the Feoffment is good, which was denied by the Court. And Clench said, if a Lessee for ten years makes a Lease for one year to him in reversion, there he in the reversion who hath the land for a year, may make a Feoffment to the Lessee for ten years, and it is good.

Trin. 41 Eliz. Moyle against Mayle.

**M**oyle brought an Action of Waste against Mayle, and declared that he had leased to him a Mannor and a Warren, and that he had destroyed a Corp-house and subverted it, and assigned otherwises in cutting down certain Thornes. Williams, The Action of waste will well lye, and said that a Warren consisted of two things, of a place of Game, and of liberty, and to prove that a waste did lye for a liberty, he cited the Statute of Magna Charta, Cap. 5. in which a Warren is intended, also the Statute of Marlebridge, cap. 24. and the Statute Articuli super Chartas, cap. 18. by which Statutes it is evident that a waste does lye for a Warren, and a Warren is more than a liberty, for a waste lies Quare warrenum suam intravit, and by the 12 H. 8. if a Lessee of a Warren does break the Waste, it is a waste, also if a Lessee of a Pigeon-house stop the holes, so that

the

the Pigeons cannot build, a waste both lye, as hath been adjudged. Also if Lessee of a Hop-yard ploweth it up and soweth Chaine there, it is waste, as it hath been adjudged. Also the breaking a Willow is waste, and so of the Wards of a Fish-pond, so that the water and fish run out: And all which cases the Court agrees, except to the principal. For the Court held it was not waste to beat up Com-boroughs, for that will not lye for Equities, because a man hath not inheritance in them, and a man can have no property in them but only possession, and although by a speciall Rate, the persons are to preserve the land they keep, in the same plight they found it, yet this does not bind every Lessee of land: Walmley, the inheritance of Com-boroughs is not waste, and it was usual to have a waste against those who made holes in land, but not against those who beat them up, because they by the land is made better: And it was said, that to dig for Stones was a waste, unless it is an ancient Quarry, although the Lessee fill it up again: And Walmley said, that in Lancashire it is waste to dig Quarries, unless it be employed upon the land: And said it was not waste to cut thornes, unless they be in a Wood stubbed and digged up by the roots; but if they grow upon the land then they may be stubbed, and it is no waste: But to cut down Thyme-trees that have stood sixty or a hundred years, it is waste.

Hil. 32 Eliz. in B. R.

Sir George Farmer against Brook.

**I**n an Action of the Case the Plaintiff claimeth such a Custom in the Town of B. that he and his Ancestors had a bake-house within the Town to bake white bread and household-bread, and that he had served all the Town with bread, & that no other could use the Trade without his license, and that the Defendant had used the Trade without his license upon which the Defendant demurs. Morgan. This is a good Prescription, and it is reason that a Prescription should bind a stranger, vide 11 H. 6. 13. A. prescribed to have a Market, and that none should sell but in a Stall, which A. had made, and was to pay for the Stall, and held there a good Prescription. And the Arch-bishop of Yorks Case in the Register. 186. is a good case. A man prescribed that he had a Mill, and he found a horse to carry the Corn thither, and that therefore they ought to grind there, and because they did not, he brought his Action on the case. Buckley contra. It cannot be intended to have any commencement by any Tenure, 11 H. 4. A. procured a Patent that none should sell any thing in London without paying him a penny, adjudged not good, and the case of the Arch-bishop was good, because he had it ratione domini & tenuri. And adjudged the principall case, that the action will not lye.

23 Eliz. in C. B.

Farrington against Charnock.

**K**ing Henry the 8. granted Turbariam suam in D. at Farrington rent being rent for 21. years and then the Lessee impleaded part of it in arable land, and relinquish part of it in Turbarie and then Q. Mary grants Totam illam Turbariam before demised to Farrington; and adjudged that that passed only which was Turbarie, and the other part, that was converted into Tillage did not passe.

Mich.



Mich. 18 Eliz. in B. R.

**S**ir Arthur Henningham brought an Action of Error against Francis Windham to recover a common recovery had against Henry Henningham his brother: and the Error assigned was, that there was no warrant of Attainder of the Record. And it was agreed by the Bar and Bench, and assigned error: But the great point was, if the Plaintiff could have a writ of Error: The Case was, Henry the Father had Henry his Son and three Daughters by one Venter, and the Plaintiff by another Venter, and died seised of the land intailed to him, and the Heirs Males of his body: Henry enters and makes a Feoffment, the Feoffee is impleaded, and dotheth Henry, who dotheth by default in the recovery, and dies without issue, and together the Daughters which are Heirs general, as the Plaintiff which is Heir in tail shall have the Error: Gawdy and Baker for the Defendant: who said, that the Plaintiff could not have the Error, but the Daughters who were the Heirs to Henry, for an Action alimies discons, according to the right of land, and it seems that the Heir in Burrow English shall have Error of Attainder: and not the Heir at the Common Law, which was agreed by all on both sides: but it was said, that this varies much from the present case, for two reasons: One, because he came in as Vouchee which is to recover a Fee-simple, and he shall render a Fee-simple in value, which is defendable to the Heirs at the Common Law. Secondly, he hath no Estate-tail. Bromley Solicitor, and Plowden contra, and laid this ground, that in all cases where a recovery is had against one by erroneous process, or false verdict, he which is grieved shall have redress of it, although he be not party or privy to the first Judgment, and therefore at the Common Law if a Recovery be had against Tenant for life, he in the Reversion shall have Error of Attainder after his death, and now by the Statute of R. 2. in his life, so in a Precipe, if the Tenant vouches, and the Vouchee dotheth by default, the Tenant shall have Error, for the Judgment was against him, and he dotheth his term: and in the 44. Ed. 4. 6. in a Trespass of Battery against two, one pleads, and it is found against him, and the plea of the other not determined, damages by the principal Verdict is given against them both, which (if they be excessive) the other shall have an Attainder. And Bromley said, there could not be a case put, but where he that hath the loss by the recovery should have also the remedy: and Baker cited 9 H. 7. 24. 6. that if a Recovery be had against a man that hath land on the part of the Mother, and he dies without issue, the Heir at the part of the Father shall have the Error. But Bromley and Plowden denied this case, and that 3 H. 4. 9. it was adjudged to the contrary: And Wray said to Baker, that he ought not much to rely on that case, for it was not Law, and said, that if Tenant for life makes a Feoffment, and a Recovery is had against the Feoffee, the first Lessee shall not avoid this. Bromley there is no use, for he may enter by forfeiture: but in our case, of whatsoever estate it be at the time of the recovery, the right of the Estate-tail is bound, and therefore it is reason that the Heir in tail shall avoid it. Jeffrey of the same opinion, and cited 17. Ass. A Conusor makes a Feoffment, and then execution is sued against the Feoffees by erroneous process, the Feoffees shall have the Writ of Error, although he be not party to the first Record, but the reason is, because of his interest in the land. And Bromley and Plowden said further, that notwithstanding the Feoffees recover against the Vouchee, and the Vouchee recover over the land, yet this recovery shall go to the Estate-tail. And Judgment was given for the Plaintiff.

Trin.

Trin. 32 Eliz. in B. R.

**T**Russell was attainted of felony by Outlawry, and after an Execution is sued against him at the suit of a common person, and he is taken by force thereof, and after he takes a Habeas Corpus out of the Kings Bench, and Coke prayed that he might be discharged of this execution, for where a man is attainted of felony he hath neither Goods nor Lands, and his body is at the Kings disposal, and so is not subject to the execution of a common person, 4 Ed. 4. But Harris Berjeant and Glanvill on the contrary, for although he is attainted of felony, yet may he be in execution, for his own offence shall not aid him: and so was it in Crofs case in the Common Pleas, where a man being attainted of felony was taken in execution at the suit of a common person, and he escaped out of Prison, and an escape was brought against the Sheriffs of London, and a Recovery against him. And at last by advice of the Court, because he was indebted to many persons, and to discharge himself from his Creditors, intended to have a pardon for his life, and to deceive them, therefore he was committed to the Marshalsey upon this execution.

Trin. 42 Eliz. Malloy against Jennings.

Rot. 1037.

**I**n a Replevin the Case was, A man seized of land in fee, is bound in a Recognizance of 100 l. and then bargains and sells all his land to the Plaintiff, and then the Recognizance is forfeit, and the Comor is sued out a Scire facias against the Comor before the Deed was enrolled, and had Judgment to have Execution. And the question was, if the Bargainor was a sufficient Tenant against whom the Execution was sued. Williams Berjeant, The Bargainor was Tenant at the time of the Scire facias before inrolment, and although it was inrolled after, shall have relation to the first liberty to prevent any grant or charge: And if an Action be brought against an Executor, as in his own wrong, and the Suit depending he takes Letters of Administration, this shall not abate the Suit. So in our case, the Bargainor was seized of the land when the Scire facias was brought, and if a man makes a Lease for life, paying Rent, and then the Lessor bargains and sells the Reversion, and before the Inrolment the Rent is behind, and the Bargainee demands the Rent which was not paid, and then the Deed is inrolled, yet he cannot enter for the forfeiture, which I have seen adjudged: & in the 28 H.8. Dyer. Disseisor of one acre makes a Release to the Disseisor of all his lands, and delivers it as an Escrow to be delivered to the Disseisor, and then he disseiseth him of another acre, and then the Deed is delivered to the Disseisor, yet the right in the second acre shall not pass. And he much relied on Sir Richard Brochers case, 26 Eliz. who made a Recognizance to Morgan upon condition to convey unto him all his lands whereof he was seized the first day of May, and it happened that one Corbet had sold him land by Indenture the 24. day of April, but the Deed was not inrolled until the 24. day of May after: And the question was, if the Comor was bound to convey these lands, or not, and adjudged that he was not, for inasmuch as the Deed was not inrolled the first day of May, he was not seized, and great mischief would ensue if the Law should be otherwise.



will: for no man will know against whom to bring his Action, for a Bargain and Sale before Inrolment has been done secretly. Herne Sergeant, The Bargainee is seized before Inrolment, and by the Statute of Eliz. which will, that one shall convert land used to tillage, into a house or other land to tillage within the manor, yet none will say that it is a breach of the Statute, although before he presently converted to tillage, and he then Chiburne cast, & Eliz. Dyer 222. that passes that before the Inrolment land passed to the Bargainee, and the Bargainee had a Freehold in him before the Inrolment, and before the title shall be executed, and if the Bargainee before a Fine, excommunicates a Statute, the Bargainee shall avoid them, and so in the case of Morgan, cited by the other two; and cited the case of Edw. in here from two Examinations, and one of them bargained and sold his Popery, and then the other Examinations cited, and then the Deed was enrolled, there nothing passed but a Popery, but it seems in that case that by the Bargain and Sale the Popery is to be done before the Inrolment, so that there is no Surplusage, but the Deed speaks not of it, and if a Bargainee be of lands held of the King without license of a alienation, there the forfeiture to the King shall relate to the first delivery of the Deed. Warberton contra. Before the Inrolment there is but a commencement of the Bargain, and before all circumstances in the Deed mentioned, are performed, it is no Bargain; and I hold the Deed shall have relation to the delivery to prevent all Charges, & Controversies, but as to strangers it shall not have such relation. If Tenant for life bargains and sells his land to another and his heirs, and then makes a Feoffment in fee to another before Inrolment, this is no forfeiture. Anderson, I release made to a Bargainee before Inrolment is void, then if this Scire facias be well brought, no Act of the Bargainee shall avoid it. Walmesley, If there be a Bargainee, and before the Inrolment the Bargainee enfeoffs him, he is in by the Feoffment and not by the Bargain, which proves that no estate is really in the Bargainee before Inrolment. Kingmill, The reason of that is, because it is out of the Statute, for the Bargain and Sale was only warranted, and he said that the wife of the Bargainee in such case shall be intreated: But the Court denied that, and all agree that the wife of the Bargainee before Inrolment shall not be intreated. Kingmill said, that it was a small course in a Recobory to make the Bargainee Tenant to the Precipe. And it was said by all the Justices, that if Tenant for life be impleaded, the Bargainee of the Reversion after Inrolment shall be received, and get (if hanging the writ) he purchase the Reversion, he shall not. And after many arguments it was adjudged that the Scire facias was not well awarded: And Judgment given for the Plaintiff.

## 37 Eliz. in C. B. Day against Austin.

Intent  
It is a Trespass, the Defendant justified the taking of a Furnace first to the earth, because the Sheriff upon an infant sold it to him. And by the Court it was held a good discharge: for if a stranger takes my Horse, and sells him, a Trespass will not lie against the taker, but a Detinue. But if one sells my Horse, and a stranger takes him, he is a Trespasser. Walmesley and Beaumont, Although such Furnace be fixed by the Terms, yet he may take it away within the term, but the



the Sherif cannot attach it; and the Tormoz may pull down a wall made by him, and it is not waste. And at another day the case was recited to be thus. The Lessee made a Furnace for the use of a Dyer, and fired it to the wall of the house, and the Lessee being condemned in debt, the Sherif came to the Furnace, and put his hands upon it, and sold it to the Defendant; where the Lessee brought a Trespass. Glanvill. A furnace may be sold in execution, and the house under the waste, but otherwise if the house, because the Lessee cannot be without them. 42 Ed. 3. 6. It is not waste to take away a furnace; 21 H. 6. 20. And there that the heir shall have such furnace, but this does not prove that it is waste a Chattell, but the cause whereby the heir shall have it, it is because it is annexed to the land, as in the case of writings which are under Chiffels. Beaumont. It is doubtless that the land due to the wall; and it is clear that the Sherif cannot take it from the wall. Dyer. The diversity is when the furnace is set to the middle of the house, and when to the wall, for the Tormoz may take it from the middle of the house, but not from the wall, for the wall is waste for taking it away, and therefore it is waste: And to this Owen agreed.

Pasch. 35 Eliz. in B. R. Rotheram against Crawley.

Rot. 332.

A debt upon a Bond, the case was, Divers questions were made between the Plaintiff Lord, and the Defendant a tenant, concerning Relief, whereupon they referred themselves to the Arbitrement of I. S. who did award, that the Plaintiff should make a Release to the Defendant (which was done) of all Actions, Duties, and Amercements: and then upon this Action brought by the Plaintiff for a collateral thing, the Release was pleaded in Bar. Coke Attorney. The Plaintiff shall not be barred by this Release, for Words ought to be expounded according to the intent of the parties, and the intent of the party was to release no Duty but the Relief, which was only in question, & this word, Duties, being interposed between Release and Amercements, shall be intended Duties of such nature as Release and Amercements, and no otherwise, as it is in Dyer 23 Eliz. A man grants and to farm lets such land with wood, this is no grant of the wood, and yet there are words sufficient to pass the wood, but being conjoined with the woods. And to farm let, it shall be expounded that it was not intended to have it be an absolute Grant. But adjudged that it was a good Bar, and Judgment was given accordingly.

Hil. 37 Eliz. Goodway against Michell

Goodway brought a trespass against others persons, Quare clausum fregerunt & duas Ramas & perches of hedge, fregerunt The Defendant by way of justification said, that the place was in the Parish of Hadham in Ely, and that all the Parishioners time out of mind, have used to have passage through the said Close in Rogation week, to make their Perambulation of the Parish, & because that the Plaintiff hindered the Defendants as Parishioners, Ramas & sepes fregerunt, whereupon the Plaintiff demurred. Spelling. The justification is not good, for although Parishioners may justify the having a way over any ground, yet they cannot break the Hedges; Also they have broken two Perches, and two Gates, which is excessive for a foot-path. 15 H. 9. 10. 6. A Commoner cannot break all the hedge upon the land where he hath Common Savile cont. All the Parishioners ought to go their Perambulation, and being a great number they may well enough justify.

for they are not compelled to keep the foot-path. 6 Ed. 2. F.N.B. 185. b. Par-  
titioners may pull down a wall that hinders them in their way to the  
Church: and in the book of Entries, there is a Precedent where the Vicar  
and Parishioners did justify an entry for this very cause, & prescribed as law  
in this case: so they may prescribe in a way, or other thing of easement  
or pleasure. 7 Ed. 4. 26 a. 1. 5 Ed. 4. 29 a. Anderson, There is no question but  
Parishioners may justify their going over any houses land in their Para-  
chialation. Warberton, Parishioners shall not prescribe in an easement, as in  
my way to the Church. Owen, The books make a difference between things  
of interest, as in common, for in such things Parishioners cannot prescribe,  
and things of easement, as a wall, for in such things a man may prescribe.  
Anderson, It is plain that Parishioners cannot prescribe, for none may  
prescribe but those that have perpetual continuance, and therefore cannot  
for years or for life, or Parishioners cannot prescribe, but must be aided by  
custom. Walmesley of the said opinion, for there is no dissent or succession  
in Parishioners. And Judgment was given for the Plaintiff.

Rot. 178.

Trin. 37 Eliz. in B.R. Norton and Sharp against Gennet.

**A** Prohibition was sued by the Plaintiff as Executor to J. S. the Plaintiff  
alleged that the Defendant sued them in the Court Christian for a Leg-  
acy of 200 l. and that the Testator had goods but to the value of 350 l. and  
set forth how he was Keeper of the Prison of Ludgate, & that he was bound  
to A. and M. Sheriffs of London, to discharge and save harmless the  
same Sheriffs from all escapes, which bond was to the value of a 1000 l. And  
between that one Holmes was taken by a Capias ut legatum at the suit of a  
stranger, and how the Testator suffered him to escape, whereupon an action  
of debt was brought against the Sheriffs, and a Judgment, whereby the  
Obligation made to them by their Testator is forfeit, and pleaded rieri in-  
termineas, and because the Court Christian would not allow this plea, they  
prayed a Prohibition, upon which Coke Attorney-general demurred. And  
it was agreed by Gawdy Justice, Coke, and Tanfield, that if the Bond to  
the Sheriffs be not forfeit, then is the Summise good, and the Legacy shall  
be paid: But Fenner said to Coke, Quomodo probas? Who answered, The  
difference is when a bond is made by the Testator for payment of money in  
a Suit at the Court Christian for a Legacy, such a bond is a good plea, al-  
though the bond be not forfeit, as in the 9 Ed. 4. 12, & 13: for the Condition  
of the Bond is part of the Bond, and a duty, but otherwise it is where the  
Condition is collateral for the performance of Covenants: but in our case  
the Condition is not broken as is supposed, for the Capias ut legatum issued  
the 25 of Eliz. and so the Arrest merely void, for every Capias ought to be  
returned the next term after the Teste, 21 H. 7. 16. 6, & 8 Ed. 4. 4 & 6. Sed alii  
contra. But after a Consultation was moved for, if a Recovery was after-  
wards had against the Executors: And it was answered, that it was not the  
course to make a Bond to the party but to the Court. But Fenner said, that  
if such course be allowed, no Legacy would be paid. And Judgment was gi-  
ven that a Consultation should be awarded if the Legatee would enter into  
a Bond to the Executors to make restitution if, &c. or otherwise not.

Hil. 38 Eliz. in B. R. Haddon against Arrowsmith.

**I**n an Ejectment, the case was; The Queen being Lady of the Manor  
of Winterburne in the County of Berks, by her Steward did license a Cop-  
pyholder for life to make a Lease for three years, if he should so long live, the  
Copyholder did make a Lease generally to the plaintiff for three years, who  
being



being ejected brought this Action. Stephen. The Action will not lye because the Copyholder hath not purchased his licence, for licence or authority must be purchased very strictly as well in form as substance, 10 H. 7. litten to on foot by Deed, as licence to impark 300. acres, he cannot entreat by paroll, as impark but 100. acres, and it was resolved the last Term in the Exchequer, that if the King license his Tenant to alien, he cannot alien to one in tail, the remainder to the King in fee: And in our case where he makes a Lease for 3 years absolutely, he hath not purchased his licence. Gawdy contra, for where his licence is to make a Lease for years, if he so long live, these words (If he so long live) are but multiplicatives; for the Law saies, that if Copyholder for life makes a Lease for years, and dies, the Lease is determined, and therefore the clause in the Licence is no more than the Law saies, and so is void. Quod fuit concessum per totam curiam. Fenner. The Condition in the Licence is merely void, for the Lord gives nothing by the Licence, but only doth dispence with the forfeiture, and the Lessee is in by the Copyholder and not by the Lord, for the Lord cannot condition with him in his Licence. Clench. The Lord may license on Condition, as where the Lord doth license his Copyholder on condition that the Lessee shall repair the house, or shall not cut Trees, for otherwise the Copyholder may cut them, and the Lord hath no remedy, for his Licence is a dispensation of the forfeiture. Popham contra, A Condition to a Licence is void, as a Licence to make a Lease for years, on condition that he pay 20 l. the second year, this is void for the reason given by my brother Fenner, for the licence does not give a right, but only executes it, as a Liberty, or Attornment; but a Limitation to such Licence is good, as license to alien for three years, he cannot alien for three, but in our case the Condition & the Limitation made by the Lord is void: and the difference is between a Copyholder in fee, and a Copyholder for life, for if the Lord doth license his Copyholder in fee to make a Lease for three years if he so long live, and he makes a Lease absolutely, this is no forfeiture, for this Lease shall be a cross interest against the Heir of the Copyholder, but otherwise of a Copyholder for life. And Judgment was given for the Plaintiff.

Pasch 38 Eliz. in C. B. Bishop of Rochesters Case.

**T**he Bishop of Rochester brought a Writ of Annuity against the Deane and Chapter of Rochester, and declared of an Annuity by Prescription, from the Prior of S. Andrewes of Rochester, wch Priory was dissolved the 28 H. 8. & 31 H. 8. their possessions were committed by the King to the Dean & Chapter of Rochest. Anderson, The Annuity does not remain, for an Annuity chargeth the party and not the possession, and therefore when the Corporation is dissolved which is the person, the Annuity is gone. *Calmeley*. But in 2 H. 6. 9. it is said there, If a Priory be charged with an Annuity, the Annuity shall continue, although it be charged to an Abby. Anderson. That is true, for there the Corporation is changed only, but here it is dissolved. *Williams*. But that is saved by the 31 H. 8. for Annuities are exprest in the saving. Anderson, But this is an Annuity or Rent with which the land is charged. Beaumont. If it be any thing wherewith the land is charged, it is saved, but the person is only charged with this Annuity. *Calmeley*. But the 21 H. 7. is, that an Annuity out of a Parsonage is not a meer personall charge, but chargeth the Parson only in respect of the land. And the Court would consider on the case.



Pasch. 38 Eliz. in B. R.  
The Case of the Dean and Chapter of Norwich.

**T**he Case was, A Church in which there had been a Parson and a Vicar since out of mind, and the Parson used to have the great Tythes, and the Vicar the small, and for the space of forty years last past, it was proved that the Parson had Tythes paid him out of a field of twenty acres of Ground, and that the field is sown with wheat, and the Vicar sued for the Tythes of Wheat in the Court Christian, and the Parson had a Prohibition on Coke, I conceive the Parson shall have the Tythes, for by the Statute of 2 H. 6. it is enacted that Tythes shall be paid as hath been used the last forty years; and this hath been always tythable to the Parson, and although the ground be otherwise employed, yet the Parson shall have the Tythes; and so was it in Norfolk, in the Case of a Park, where the Parson prescribed Pro modo decimandi, to be paid three pence, four pence, for all Tythes rising out of the said Park, and although the Park was after converted to arable, yet no other Tythes shall be paid.

Popham, It hath been adjudged otherwise in Wroth's Case of the Inner Temple in the Exchequer. But the Law is clearly as hath been said; and the difference is, when the Prescription is to pay so much money for all Tythes, or when the Prescription is to pay a shoulder of every Buck, or a Doe at Christmas, for there if the Park be deparked, Tythes shall be paid, for Tythes are not due for Wenison, and therefore they are not Tythes in Specie. And I conceive that Tythes of Wheat-heads shall be comprehended under small Tythes, and although the Tythes of this field have been paid to the Parson, yet if being converted to another use, whereof no more Tythes do come, the Vicar shall have the tythes; and if all arable land be converted into an Orchard, the Vicar shall have tythes of the Apples; and if the Orchard be changed to arable, the Parson shall have tythes. Quod Fenner concessit.

36 Eliz. Higham against Deff.

**I**f a Trespass, the Case was, That a Vicarage by composition was introduced of the third part, Omnium Bladorum decimarum, of the Mannor of D. If he shall have tythes of the Freeholders of the Mannor, was the question. Johnson, He shall not have them, for a Mannor consisteth of two things, viz. of Demesnes and Services, and the Freeholders are neither parcel of the Demesnes nor the Services, and therefore no parcel of the Mannor, and this is proved in 12 Ass. 40. a Kent charge was granted out of a Mannor, the Tenancy escheats, it shall not be charged with the Kent.

Tanfield contra, For this word Mannor, does extend to the Precincts of the Mannor, and not to the Demesnes and Services only, and therefore if a Venire facias be awarded De viceneto Manerii de D. the Freeholders shall be returned; also a surbey of a Mannor shall be as well of the Freehold lands, as of the Demesnes, and if the King grants a Keet within the Mannor of D. all the Freeholders are bound to appear.

Fenner, Grants ought not to be restrained to their strict words, but are to be construed according to the intent of the parties.

Trin. 38 Eliz. in B. R. Ewer against Henden.

**I**n an Ejectment the Jury found that I. S. being seised of a Capitall Messuage in the County of Oxford, and also of a house and land in Walter, in

In the County of Hartford, makes a Lease for years of his house and land in the County of Hartford, and then by Will does demise his house in the County of Oxon. Together with all other his Lands, Meadows, Pastures, with all and singular their Appurtenances in Walter in the County of Hartford, to John Cwer: and whether the house in Walter, in the County of Hartford does passe, or not, was the question.

Tanfield, The house shall passe, for if a man builds a house upon Black acre, and makes a feoffment of the acre, the house shall passe, and so if a man does devise una iugata terra of Copyhold Land, the house of the Copyhold does passe also, for so is the common phrase in the Country; and so if a man be rated in a local tax, that does include houses, and by the grant of a Tenement the house passeth, but if a man be said a house in a Precipe, there the house ought to be named.

Whistler contra, It is true that if a man generally does devise his Land, the houses passe: but in this case the Devisee hath particularized his Land, his Meadow, and his Pasture, and if he intended to have passed his house, he would have mentioned them as well as his Land.

Fenner, I am of the same opinion, for this speciall naming of particulars does exclude the generall intentment; and if the Devisee had a Will there, that would not passe by these words.

Popham contra, For if a man sells all his Lands in D. his houses and woods passe by this word, Lands, and so was it agreed in a case which was referred to Dyer and Wray chiefe Justice, and there reason was, because that a Warrant of Attorney in a Precipe of a House, Woods, and Land, is solely of Land; which proves that land does comprehend all of them; and therefore I conceive, if a man does devise, or bargain and sell all his lands in D. the Kents there shall passe, for they were issuing out of the land: But if a man be seised of three houses and three acres, and he deviseth all his land in D. and one of his houses, the other houses will not passe, for his expresse meaning is apparant, but here the words are in generall as to the lands in Walter, and therefore the houses do passe. But afterwards it was adjudged that the house did not passe, for by the particular mentioning of all his Lands, Meadows and Pastures, the house is excluded.

Pasch. 4 Eliz. Hunt against King.

In a Will of Cwer; upon a Judgment given in the Common Pleas in a Formedon brought there; the Case was, Tenant in tail entails his Son, and then disleiseth his Son, and levies a fine to a stranger, and before the Proclamations passe, the Son enters and makes a feoffment to a stranger, the Father dies, and the Son dies, and the fine brings a Formedon. The question was, whether by the entry of the Son the fine was so defeated that the Estate-tail was not barred. Dyer, The Estate-tail is barred, and made a difference where the fine is defeated by entry, by reason of the Estate-tail, and where it is defeated by entry by reason of another estate-tail, as in 40 Eliz. Tenant in tail discontinues, and disleiseth the Discontinuer, and levies a fine to a stranger, and retakes an Estate in fee: before the Proclamations passe, the Discontinuer enters, and then the Tenant in tail dies seised, and adjudged that the fine is not remitted, for the Statute 32 H. 8. saies, That a fine levied of lands any way intailed by the party that levies the fine shall bind him, and so it is not materiall whether he were seised by force of the Estate-tail, or by reason of another Estate, or whether he have no Estate.

And



And all the Justices were of opinion that the Estate was barred, for although the discontinuance had avoided the Fine by the possession, yet the Estate still remained concluded, and the same shall not enter by force of the Estate, but by force of the Fee which he has by discontinuance.

Popham, A continuance of a Fine at this day differs much from avoidance of a Fine at the Common Law, for it appears by the 16 Ed. 3. that if a Fine at the Common Law be defeated by one who hath right, it is defeated against all, but at this day the Law is contrary, for if a man be disseised, and the Disseisor die seized his Heir within age, and he is disseised by a stranger who levies a Fine, and then five years passe, the Heir shall avoid this by his homage, yet the first Disseisor is bound for ever, for the Infant shall not avoid the Fine against all, but only to restore the possession: And therefore it was adjudged in the High Stewards Case, 24 Eliz. where James was seized then to him and his Wife, and the Heir of him, and he died, and his Heir entered and levied a Fine to a stranger, and before the Writs were made, the Heir entered, it was adjudged that the Fine was barred, for the Wife shall not avoid this but for her own Estate: And so if a stranger enters to the use of him who hath right, this shall not avoid the Fine.

Fenner did agree to this, and said that it had been so adjudged; but all the Justices agreed, that the Estate still being barred, the entry shall go to the benefit of him who hath most right to the possession, and that is the discontinuance; and therefore the Plaintiff in the Formedon hath gone with to the Land, but on sale to the Fee, and not to the Heir, for that is barred by the Fine.

28 Eliz. in C. B. Rot. 2130.

### Gibson against Mute's.

**I**n a Replevin the Case was; John Winchfield was seised of Lands in Fee, and by his Will did devise all his Lands and Tenements to Anthony Winchfield and his Heirs, and before his death made a Deed of Feoffment of the same Lands, and when he sealed the Feoffment, he asked, If this Feoffment will not hurt this last Will, & if it will not, I will seal it? And then he sealed it, and made a Letter of Attorney to make Libery in any of the said Lands, the Attorney made Libery, but not of the Lands which were in question, and then the Testator died. And the question was, If the Heir as Heir of the Testator should have the Lands? And it was said in behalf of the Heir, that if the Testator had said, It shall not be my Will, then it is a Revocation. Quod curia concessit: But it was the opinion of the Court, that it appears that it was the intent of the Testator that his Will should stand, and if it be not a Feoffment it is not a Revocation in Law, although that the Attorney made a Libery in part, so that the Feoffment was perfect in part, yet as concerning the Land in question, whereof no Libery was made, the Will is good; and the Jury found accordingly that the Lands does not descend to the Heir.

Fenner cited a Case of Merchant Jeffereys, where it was adjudged, that where one has made his Will, and being demanded if he will make his Will, both say he will not, that this is no Revocation.

28 Eliz.



Sir Wolſton Dixy againſt Alderman Spencer,  
20 Eliz. in C. B.

**I**n a Writ of Error brought upon a Judgement given in an Aſſiſe of freſh-ſorce in London, The caſe was, Sir Wolſton Dixy brought an Action of Debt for rent arrear againſt Spencer upon a Leaſe for years made to him by one Bacchus, who afterwards granted the reversion to Dixy, and the Tenant attorned, and for rent arrear Dixy brought an action, &c. The Defendant pleaded in Bar that beſore the Grant made to Dixy, the ſaid Bacchus granted it to him by parole, according to the cuſtome of London; whereupon he demanded Judgement, &c. and the Plea was entred on Record, and hanging the ſuit, Dixy brought an aſſiſe of freſh ſorce in London, and all this matter was here pleaded, and it was adjudged a forſeiture of the Land; and hereupon Spencer brought a Writ of Error, and aſſigned this for error, that it was no forſeiture.

Shuttleworth. It is no forſeiture untill a Trial be had whether the reversion be granted, or not; as in waik: the Defendant pleads that the Plaintiff had granted over his eſtate, this is no forſeiture; and in the 26 Eliz. in a *Quid Juris clamat*, the Defendant pleaded that he had an eſtate Tail, and when he came to have it tryed, he acknowledged he had an eſtate but for life, and that was no forſeiture: But the Court ſaid, they could remember no ſuch Caſe.

Walmſley. It was ſo adjudged, and I can ſhew you the names of the parties.

Periam Juſtice. If there be ſuch a Caſe, we would doubt of it, for there are Authorities to the contrary, as the 8 Eliz. and 6 Rich. 2.

Anderſon. If the Defendant in a Treſpaſs prays in aid of an eſtranger, this is a forſeiture; and if it be counter-pleaded, it is a forſeiture, and the denial alters not the Caſe.

Walmſley. The Books in 15 Ed. 2. Judgement 237. and 15 Ed. 1. that Judgement in a *Quid Juris clamat*, ſhall be given beſore the forſeiture.

Anderſon. In my opinion he may take advantage beſore Judgement as well as after, if the Plea be upon Record. And ſo was the opinion of the Court.

The Dutcheſs of Suffolks Caſe. Paſch. 4 & 5 Ph  
& Mary, in C. B.

**I**n a *Quare impedit* againſt the Biſhop of Exeter, the Writ was ad-  
*reſpondendum* Andrew Stoke & Dennis Francisca de Suffolke *uxori eius*. Benlowes demanded Judgement of the Writ, &c. becauſe ſhe loſt her name or dignity by marriage with a baſe man, as it was adjudged, 7 Ed. 6. Dyer 79. where Adam Powes and her husband brought a Writ of Dower, and the Writ abated, becauſe ſhe called her ſelf Dame Powes, whereas ſhe had loſt her dignity by marrying with her husband.

Stanford agreed, for *Mulier nobilis, ſi nupſerit ignobili deſinit eſſe nobilis*.

Brookes.

Brookes. There is a difference where a noble woman marries a noble man of less noble degree than she is, and when she marries one that is not at all noble; so; in the first case she shall hold the dignity of her second husband, but in the last case she shall retain her ancient dignity. And so it was observed, where the Marquis of Dorset had two daughters, the elder was married to the Lord Audley, and the youngest to a Gentleman, and the eldest took place always, as wife to a Baron, but the youngest kept her place as a Marquesses daughter.

Dyer. I was of Counsel in the Case of the Lady Powes already mentioned, and she would by no means lose her dignity, and an Issue was brought into Court, that said she had such dignity, although it was held clearly on the contrary by our Law by Montague and Hales, and the Writ did abate.

Stanford. A noble man loseth his honour by his own act, as by attainder, and so hath the woman here by taking such husband, and the nobility of such woman is lost also by attainder.

Brookes said, That he knew where the sons of a Duke and Marquis had a trespass brought against them for hunting a Park by the name of Squires, and it was good; wherefore it was said to Benlows, that he must plead to the Writ.

### Pasch. 4 & 5 Ph. & Mary in C. B.

**A** feme sole having the custody of the land, and body of an Infant took husband, and she and her husband did tender convenient marriage to the Infant, which he refused, and married himself elsewhere, and at his full age entered into the land; if it be necessary that both shall join in a Writ of sequestration upon the marriage, or that the husband alone shall have it, was the question.

Brown Justice. Both shall join, and so is it ruled in a Book.

Dyer contr. The husband alone shall have this Writ, so; he may discharge it, or release it; and by the 5 Ed. 3. 14 & 6. the husband alone may have a Writ of Trespass; and if the wife has an abbotson, and a stranger present, the husband alone shall have a *Quare impedit*; and the same Law is, where the woman hath a Rent, and the husband distrains, and Rescous is made, the husband alone shall have a Rescous.

Prideaux. The Wardship of a Ward and Land is a thing real, and the Survivor shall have it, and not the Executors of the Baron; and if an Action be accrued before marriage, as if a Bond be made to her before marriage, she shall join with her husband in the Action upon the Bond: but if a right to an Action does accrue after marriage, there she shall not join: as here the right of the husband does not accrue until marriage; so; the Action is not in respect of the Wardship, but of the tender and refusal, and his marriage elsewhere, all which do accrue after the Coverture.

Stanford. If a man bring a *Quare impedit* so; an Abbotson which he hath in right of his wife, and hath Judgement to recover, and dies, the wife shall present, and not the Executors of the husband: so; if he recover in a Trespass, the wife shall have execution for the damages.

Prideaux. If a Lease be made to a woman, and a Rent reserved *nomine paria*, and she takes husband, and the Rent is behind, both shall

shall joyn in the Action for the pain. Dyer. This Action is grounded upon a real Covenant. Stanford. Damages recovered in a Trespass are not real, yet the wife shall have them, if the husband dye before Execution. Dyer. The Trespass is done to the inheritance of the wife, and therefore she shall have damages; and in 43 Ed. 1. Scatham. The husband alone bought a ratiſhment of a Ward, for a Ward he had in right of his wife, and the Writ held to be good; but there it is said, that otherwile it is in right of a Ward; and if they joyn in a Writ of ratiſhment of Ward, and recover, and the husband dye before Execution, his Executors shall have Execution, and not the wife; but it is said there (*Quere*) and at last it was agreed that the Action should be allowed: but the surest way is to have both joyn.

Pasch. 6 Eliz. Powtrells Case in C. B.

**I**n an Ejectment the case was, a woman-tenant in Tail did make a Lease for 31 years, and took husband, and had issue; the wife dyes, and the husband is tenant by the curtesy, and surrenders to the heir, who puts out the Lessee, who brings this Action.

Dyer. I doubt whether this surrender be good, for tenant by the curtesy is but in reversion, and hath nothing in possession, and it is dubious how he can surrender.

Wotton and Brown. He may surrender for a term; of frank-tenement may be surrendered to him that hath the estate in reversion or remainder, if it be not a mean estate, as tenant for life, the remainder for life, the remainder in fee, the first tenant for life cannot surrender to him that hath the fee. But the great point of the Case was, if the issue could abate the Lease during the life of the tenant by curtesy; and the Court held he could not, for the tenant is in as a purchaser. And by Walsh and Carus. If tenant by the curtesy grants over his estate, and then enters into religion, the Grantee shall have his estate during the tenants natural life, *Quod omnes concesserunt*; and it was said also, that if the heir had been impleaded during the life of the tenant by curtesy, he shall not have his age, *quod fuit concessum*.

Mich. 14 & 15 Eliz. Tottenham against Bedingfield.

**I**n an Account the Defendant pleaded he was never his Wille for to render account.

Gawdy prayed the opinion of the Court if the Action would lye, for otherwile he would not trouble the Court. The Case was, the Plaintiff had a Lease of a Parsonage, and the Defendant being no Lessee, nor claiming any interest, takes the Tithes being set forth, and carries them away; if the Plaintiff could have this Action was the question.

Manwood. It will not lye; for an account lyes where there is property, but wrongs are allowed without property; but I agree, that it



one receiveth my rents, I shall have an account against him; for by my consent afterwards I do make a profit; for although that he hath received the Rent, he hath not done wrong to me inasmuch as it is not my money until it be paid to me; but otherwise it is where a man disseiseth me of land, for that is merely a wrong, and so is it in this case; for when the Tithes were let forth by the Parson, the Law saith they are in the possession of the Parson; and therefore when the Defendant took them away, he does it wrongfully, and therefore no account will lie against him; and so was it adjudged in London in the Case of one Monax, who under colour of a Debit, did occupy land for 20 years, and after the Debit was adjudged void, he that had right to the land, brought an account against him; and adjudged that it does not lie.

Harper contr. For an account does lie against a Debitor, and the Plaintiff may charge him as Debitor, and it is no Plea for him to say that he did not occupy as Debitor, no more than it is a Plea for him who occupies as Guardian, to say he was not the prochein amy.

Dyer. There are three Actions of Account. 1. Against a Bailly. 2. Against a Receiver. 3. Against a Guardian in socage; and if an Account be brought against one as Receiver, he ought to charge him with the receipt of money, and I conceive that there ought to be a profit to charge one with the receipt of money: but if one claim as Bailly, or as Guardian in socage, he is chargeable in account: but an Abbot, or a Dissolver, is not, because they pretend to be owners, and in this case, because by the letting forth the Tithes the property is in the Parson, therefore he being Abbot for years, he shall have an ejectione firma, and not an Account.

### Hillar, 32 & 34 Eliz. Carter against Kungstead, in C. B.

Rotulo 120.

**J.** A Writ of the King gave this special Verdict. John Berry was lord of the manour of Scapeley in Odiam, and of other lands in Odiam, and the 32 H. 8. suffered a common recovery of all his lands in Odiam, Scapeley and Winkfield, to the use of himself and his wife for life, the remainder to the heirs males of his body. & quod illius frater of the manour of Scapeley, with the appurtenances, to the use of himself for life, the remainder to the heirs males of his body, whereby they were seized *prout Lex postulat*. The husband dies, the wife makes a Lease for 19 years, and whether the manour of Scapeley were conveyed or not, was the question.

Harris. She shall have all; for when the whole estate is limited at the beginning of a Deed, it shall not be abridged afterwards.

Periam. The estate is by way of use, which shall be expounded according to the intent and will of the Maker; and if this had been done by will, it is clear the woman should not have the manour of Scapeley.

Anderson. If I beile my land to J. S. and afterwards by the same will I beile it to J. D. and J. S. shall have nothing, because it was my last will that J. D. should have it: But otherwise it is of a use; for it is to have the estate to the use of J. S. and in the last clause do limit the same estate to J. D. the limitation to J. D. is void for the repugnancy.

Periam.

Periam. As to the case of the Will: I conceive it is voyd to both, because it cannot be known who shall have it.  
Anderfon. I am sure the Law hath been taken as I have said; and there was a Case in the Upper Bench, where a man one day made part of his Will; and another day made another part, which was deprecating to the first part, and adjudged that the last was good, and the first voyd.

Periam. I agree to this Case, for here is a difference in time.  
Anderfon. So is there in my Case; for when I made my Will, I am thinking how I shall dispose of my estate, and it shall be intended that I have last added concerning that which I have done last.

Walmesley. A Will is not to be compared to a Will; for the Statute of 27 H. 8. hath made it an estate; and then by the 15 of Edw. 3. If a man limits an estate at the beginning of a Deed, he cannot after abrogate it.

Periam. I put this Case: If a man covenants upon consideration to be seized to the use of himself for life, and after to the use of his son; but he further says, that his meaning is, his wife shall have it for her life, this is not a voyd Clause, but good to the wife; and the Case was adjourned till next Term. And Harris argued again, and said, that a Will was but matter of trust, and for that it is apparent that the intention was that the wife should have nothing, there is no reason that another construction should be made.

Walmesley. The limitation of the Will is but a declaration how the Will shall be, and does not give any thing; and the opinion of the Court was against the Plaintiff who was Lessee of the woman, and that the last Clause does countermand the first, as to the spanners of Stapely.

**B**artholomew Brokesby brought a *Quare impedit*; and it appeared by his Declaration, that the next advowson was granted to him, and one Humphrey Brokesby; and then the Church became voyd, and Humphrey did release to Bartholomew *totum statum & vitalum*, &c. and then Bartholomew being disturbed, brought a *Quare impedit* in his name alone.

Harris. The Plaintiff shall be barred, for the other shall be named with him, for the Release is voyd; for when the Church becomes voyd, it is a thing in action, and of privacy and confidence, and cannot be released nor transferred.

Dyer 283. a. 28 H. 8. 26. a. Where it is said, that it cannot be granted over, no more than an Executor may release his Executorship to his companion.

Beaumont. In my opinion it is not a Chose in action, but an interest which the Executors have; and by the 14 H. 4. m. 4. If a man be seized of an Advowson with the right of his wife, and the Church is voyd, and the wife dyes, yet the husband shall present; which proves it is not a Chose in action; for by the 25 Edw. 3. 23. the husband shall not have an obligation that was made to his wife;

and in our case by this adovance the Church is become an interest and a Chattell: and therefore one Joyntenant may release to another by reason of their perty: although they have no possession,

Fenner. The release is *Tota in Statutu jure & consuetudine* but here he hath no estate nor possession, and therefore the release is void. And to prove that there is no estate nor possession, it is proved by the pleadings of the grant of the next adovance, for he shews that the Church became voyd, and that *ratione pertinet ad ipsum presentare*, and not by force, whereof he was possess, and if none hath the advowson which becomes voyd, and the voyd claymes the advowson, yet he shall not have the present adovance; and as to the case of the Joyntenants, one cannot release to the other for default of possession for the release inanes by reason of their joynt possession which is out of them, but release of the Demandant to the Wouchee is good by reason of the perty of Law that is betwixt them; and in 11. 4. He who hath right after the Incumbent is instituted and inducted, may confirme his estate, and therefore the Release here is good.

Anderfon. We are all agreed that the Release is void; and gave Judgment that the Plaintiff should be barred.

### Bretton against Barnet. Mich. 41. & 42. Eliz.

A man delivers money to J. S. to be redelivered to him when he should be required: which J. S. refused, and therefore an action of debt was brought, and the defendant demurred; for that an action of debt would not lie, but an account, as in the 41. Ed. 3. 11. & 33.

Walmesley. An action of debt will very well lie. And he took a difference between goods and money: for if a horse be delivered to be redelivered, there the property is not altered, and therefore a Detinue lies, for they are goods known: but if money be delivered, it cannot be known, and therefore the property is altered, and therefore a Debt will lie. And if Portualls or other money that may be known be delivered to be redelivered, a Detinue lies.

Owen and Glanvill agreed to this, and Glanvill cited a Judgment given in Hilary Term, wherein he was of Councell, which was that a man delivers money to another to buy certain things for him, and he does not buy them, the party may bring an action of debt, but he said that the Plaintiff ought to aver that the Defendant had not redelivered them. And Judgment was given for the Plaintiff.

### Mich. 41. & 42. Eliz. Green against Wiseman. in C. B.

In an Ejectment. The Defendant pleaded, that a Feoffment was made to the use of J. S. the Lessor of the Defendant, who by force thereof, and of the Statute, was seised, and made a lease to the Defendant; and that one Green entered and made a Lease to the Plaintiff, and did not say that he entered upon J. S. And all the Question was, whether when a feoffment is made to the use of another, if he have such a feoffment before his entry, whereof he may be seised.

Glanvill.



Glanvill. He hath no freehold, neither in Deed nor in Law before entry.

Walmesley. This is contrary to all the Books: for a possession in Law is so translated from the feoffee to Cestuy que use, that the wife of the feoffee shall not be endowed.

Owen. He ought to have alleged a Disseisin.

Anderson. As he might have possession by force of a Deed at Common Law, so he shall have possession of the land here by force of the Statute, and it is in Cestuy que use, before agreement or entry, but if he disagree, then it shall be out of him presently, but not before he disagrees. And after viz. Hillar. 41. Eliz.

Williams moved the case again, and Walmesley said then, that he might be disseised before his entry or agreement, and the pleading shall be that he did enter, and did disseise him, but he shall not have a trespass without actual entry, for that is grounded on a possession: Glanvill agreed to this, and advised Williams to adventure the case thereupon.

Hillar. 41 Eliza. Smiths Case in C. B.

The Patron of an advowson before the Statute of 31 Eliz. For Symony, doth sell *Proximum advocacionem*, for a sum of money, to one Smith, and he sells this to Smith the Incumbent: After which comes the generall pardon of the Queen, whereby the punishment of Smith the Incumbent is pardon'd, and of Smith the Patron also. If the Incumbent may be removed was the Question: Williams said, that the Doctors of the Civil Law informed him, that the Law Spirituall was that for Symony the Patron lost his presentment, and the Ordinary shall present, and if he present not within 12 months, then the Metropolitan, and then the King.

Spurling Sergeant. This punishment cannot discharge the forfeiture, although it discharge the punishment.

Glanvill contra. And said that this point was in question, when the Lord Keeper was Attorney, and then both of them consulted thereupon, and they made this diversity viz. between a thing void and voidable, and for Symony the Church is not void untill sentence declaratory, and therefore they held, that by the pardon before the sentence all is pardon'd, as where a man commits felony, and before conviction the King pardons him, by this pardon the Lord shall lose his Escheate, for the Lord can have no Escheate before there be an attainder, but that is prevented before by the pardon, and so here this pardon prevents the sentence declaratory, and so no title can accrue to the Ordinary.

Walmesley cont. If the patron be charged by the sentence, he may plead the pardon. But if a *Quare Impedit* be brought by a third person, the pardon of the King shall be no bar to him, for the title appears not to him, but only the punishment.

Anderson. They may proceed to sentence declaratory, notwithstanding the pardon; for the pardon is of the punishment, but the sentence does not extend to that, but only to declare that the Church is void.

Glanvill in 16 Eliz. a man was deprived of his Benefice for incontinency, and after he was pardoned and restor'd.

Walmesley. I doubt much whether the King can pardon Symony:

Am

68 Jelsey against Robinson. Trinit. 25. Eliz. continued  
untill Pasch. 28. Eliz. in C. B.

And Williams said, that the Doctors of Civil Law said, that neither the Pope nor the King could pardon Symony, *quoad culpam*, but only *quoad penam* they may. And the Court at last said, that if the parties would not demur, they would hear the Doctors upon this matter.

Rot. 704. &  
1544.

Jelsey against Robinson. Trinit. 25. Eliz. continued  
untill Pasch. 28 Eliz. in C. B.

Upon a speciall verdict upon an Ejectment, the Jury gave this speciall verdict. That the King was seised of the Mannor of Freemington, and of the hundred there, and granted this to Hampton to hold of the Mannor of East-Greenwich by fealty, and 13 l. Rent, and then the King being seised of the Mannor of Crankford, of which the place in Question was parcell, does grant his Mannor of Crankford, and his Mannor of Freemington, to the Marques of Exeter and his heirs, who by his Will does devise Legacies to his servants, and does devise that all his Legacies shall be payd out of the Mannors of Freemington Upland and Crankford. All which Mannors I give to my Cousen Blunt and his heires. And the Defendant, as servant to Baker who was heir to the Marques, do eject the Plaintiff; the question was, if by the Devise of the Mannor of Freemington the Rent of 13 l. did passe or not, if it does not passe, then by the Statute of 32 H. 8. the 3. part of the Mannor of Crankford does not go to the devise, but descends to the heire at the Common Law.

Shuttleworth for the Plaintiff. The feignory does not passe by the devise of the Mannor, for the intent thereof shall be collected, by the words of the Will. 15 H. 7. 12. a. 19 H. 8. 9. & 6. but here he limits a distress out of a Lordship, which cannot be 3 H. 6. Also it is doubtful if the feignory being entire, may be divided by force of the Statute of the 32 H. 8. And I thinke not, for when the Statute says that the lands devised shall be devised into three parts, and that is to be understood of such an estate as may be divided, but so cannot a feignory: For put the case that the Lord held by a Hauke, the whole Mannor shall descend and cannot be divided, and so de catalla Fello-num. Fenner contra. For it seems to me that the feignory passeth, and so it shall be, if he held but a mesuagium 7 Ed. 4. A man held by Frankalmourne, he shall say, *infra feodum suum*, and in reputation amongst men, a feignory is a Mannor: for if a man makes a feoffment of a Mannor, with liberty where he hath no Mannor, yet shall it passe, 7 E. 3. Where a Mannor passeth by the name of Knights Fee. And as to the intirenes of the feignory it is easily answered, for although the rent were entire, yet it may be severed, for a Rent Charge is entire, yet a proportionment may be made thereof 44 Ed. 3. To which the Court agreed that the Rent without doubt might be severed.

Walmesley. For the Plaintiff, the Question is if the Rent passeth by the name of a Mannor to the Devisees. If a Grandmother deviseh land to her daughter J. S. Whereas she is her daughters daughter, yet this is good, because in common speaking she is so called, but here the words are not apt, nor used in common speaking, viz. That Rent should be taken for a Mannor, and therefore it is void, as a gift to the right heirs of J. S. who is attaind 19 H. 8. And he concluded with this difference, that where the words have any affinity or likelihood

to the *Spanno*, then it will passe by the name of a *Spanno*. As if a man deviseth his house and land by the name of a *Spanno*; it shall passe. But here being but a service, it is otherwise.

Gawdy cont. For if it the Rent passe not nothing shall passe, which is a hard construction on a Will. For 21 Rich. 2. Devise 27. a Devise Ecclesiar sancti Andreæ is a good devise to the Parson of the Church.

And in Bretrand Rigdens Case a man devised a *Spanno* in which he had nothing, and after purchased the *Spanno*; the devise is good. And in 26 H. 6. feoffment 12. Land will not passe by deed by the name of a house, but land will passe by the name of a Carue, and a Carue by the name of a *Spanno*; and I hold that the Rent in this case will passe by the name of the *Spanno*; for a *Spanno* does consist of Demesnes services, and rent may be called a *Spanno* aswell as a Carue; and and the King gives it by the name of a *Spanno* to the Debisor, and that is the reason that the Debisor calls it a *Spanno*: And if you grant to me an Advowson by the name of the Church and Rectory, and I devise the Rectory, the Advowson and the Church will passe by the name of Rectory: And in Plouden. 194. A man did let his house and great demesnes rendring Rent, and did devise to another all his Farme; there the Debisee shall have all the Rent and the Reversion also.

Michaelm. 29. & 30. Bishop of Lincolnes Case.

Ror. 1528. &  
1202.

*I*ſſ a quare impedit, brought by the King, against the Bishop of Lincoln and Leigh, the Incumbent: The Case was. The Bishop had an Advowson in gross, and presented J. S. who took a second Benefice with cure, whereby the first became void, and continued so untill Lapse fallen to the Queen, and after the title of Lapse fallen to the Queen the Bishop presented one J. who was inducted, and by reason of Recusancy to pay Tithes, was deprived, and by the Statute 26 H. 8. the Church became void inso facto, whereupon the Bishop presented one Leigh within six months, and now the Queen would present. Fenner. This Case is the same with Bosherulls, lately adjudged. But the Court said, that here was a privation for Recusancy; and therefore it would make a difference. And afterwards Paich. 30 Eliz.

Walmeſley. For the Queen said. That if a Lapse be fallen to the Ordinary, if the Patron doth present before the Bishop hath Collated, he ought to receive his Clerk, but where it is dissolved to the King, the Patron by no means can defeat the King, but he may remove his Clerke at his pleasure, but if such Incumbent be present after such Lapse, and so, then the title of the King is gone, and his time passed by the act of God: but in our Case the avoidance which does oust the King from his Lapse, is avoidance by reason of Recusancy to pay Tithes, which is the proper act of the Incumbent, as is a resignation, and no such avoidance being by the act of the party himself shall oust the King of his Presentation, for in the 1 H. 9. In annuities against an Abbot, who resigns the *W*ill shall not abate, for then the Plaintiff shall never have a good *W*ill. So in our case, if the King be ousted of his Lapse by such devise, he shall never have a Lapse, for every one will usurp upon the Kings Lapse.



Lapse, and will presently resign, and consent himself whereby to absolve the Lapse. And in the 18 Ed. 4. the 19.

By Pigor. A writ brought against a Prior; Shall not abate, although the Prior be not deposed, for it is his own fault.

Fenner. This Lapse is given the King by his prerogative, but on this Condition, that he take it in one time: for so is the nature of things lapsed, for if after a title accrued to the King he suffer usurpation, and the Incumbent die, his Lapse is lost, for the nature of the Lapse is such that it must be taken at its time, and where the title of the King is limited to a time, there he shall not have his prerogative: for a prerogative cannot alter estates. As if the King grant a feignship in gross rendering Rent, and the Tenant to the Lord dies without heir, whereby the tenant escheates, the feignship is extinct, and the Rent of the King is gone, as well as it is in the case of a Common person. And so if the King have a Rent seek for life out of my land, if I die he cannot distrein in my land for the arrearages as he may in my life time. And so where the Statute gives Annum diem & vassum to the King, yet he shall not have it after the death of the Tenant for life, so if the King receive a Rent upon a Lease to an Stranger, and the Stranger enters in respect of the land, whereby his entire rent is suspended, as to the condition as to the King also is suspended during that time, for the nature thereof is to be attendant upon the rent 22 H. 3. If a man grant a Rent upon condition to cease during the minority of his heir, and after this Rent comes to the King, and the Grantee dies, the Rent shall cease during the minority of his heir: so that by all these cases the reason appears that the nature of the Lapse is to be taken hac vice, and the King must take it then, or not at all: and where it is objected that by this means every Lapse may be taken from the King: I conceive that far greater inconvenience will be to the Patrons on the other side: for when a Lapse is devolved to the King, and a Stranger presents, if then the true Patron may not present untill the death of such Incumbent, perhaps the Incumbent will resign, or be deposed, and a Stranger shall be presented again and again in like manner, and so by this means the Patron shall never continue his advowson, for by the Couin between the Stranger, and the neglect of the King to take his Lapse, the Incumbent shall never die. And afterwards in this term. It was adjudged that such usurpation shall not take away the Lapse from the King, because the advowance accrued by the act of the Incumbent. Cook ib. 7. 27. a.

### Hillary. 29 Eliz. Lassell's Case.

Lassell brought an action of debt upon an obligation, the Defendant pleads, that the condition was, that he should personally appear before the Justices, and let forth, how he was taken by a Latitat by the Plaintiff who was Sheriff, who took this obligation up, on his deliberance: and urged the Statute of 23 H. 6. and said that the obligation was not according to the Statute. And by the Opinion of three Justices (Anderson being absent) If it were in such an action wherein a man may appear by Attorney, then it is void. And the Plaintiff moved a Judgment given in the Kings Bench, wherein in such case Judgment was given for the Sheriff, and it was between Soekford and Gats 27. & 28. Eliz. Rot. 373. And the next Term it was undone again.

Anderson.

Kayre against  
Deurat.

{ Michell against  
Donton.

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Anderson. The Obligation is voyd; for when an expresse form is limited by the Statute, no variance ought to be from it. But the other three Justices were against him, for they held that he ought to appear in his proper person in case of a Latitar.

Anderson. I deny that, for Latitars have not been of above 60 years continuance; Vid. Cook, lib. 10. Beufages Case; and his first Institutes, 225. a.

Pasch. 25 Eliz. Kayre against Deurat,  
in C. B.

Rot. 603.

**I**n a Waste, the Plaintiff declared how the Defendant was seized in Fee, and made a Feoffment to the use of himself for life, the remainder to the Plaintiff in Fee, after which he committed waste. The Tenant said, that he was seized in Fee, without that he made a Feoffment as the Plaintiff declared; and upon issue joyned, it was found that the Defendant was seized in Fee, and that he made a Feoffment to the use of himself for life of J. S. without impeachment of waste, the remainder ut supra; and whether this was the Feoffment which the Plaintiff alledged, they prayed the advice of the Court.

Anderson, Chief Justice. If the impeachment of waste be not part of their issue, then the Verdict is voyd for that point, and that which is found more than their issue is voyd, 33 H. 6. the Defendant pleaded that he was not Tenant of the Freehold, and the Jury found that he held jointly with another, there the Plaintiff shall recover. And then at another day it was said by the Justices, that the Jury had found such an estate as was alledged by the Plaintiff; and although that they further found this privilege to be dispurged of waste, which upon the matter proves that the Plaintiff hath no cause of action, yet because the Tenant may choose whether he would take hold of this privilege or not, the Jury cannot find a thing that is out of their Verdict, and whereof the Defendant will not take advantage by pleading, and for this cause their Verdict was voyd. 7 H. 6. 33. 31 H. 7. 12. where one pleaded in Bar a Feoffment, and traversed the Feoffment, and hereupon they were at issue, and the Jury found that he had enfeoffed the Tenant after the Fine levied to the Plaintiff; this cannot be found, because it is out of their issue, 31 Assi. 12. and Judgement was given for the Demandant.

Hillar. 29 Eliz. Michell against Donton,  
in C. B.

Rot. 639.

**I**n an Ejectment a man makes a Lease, rendring Rent, with a Covenant that the Lessee shall repair the houses, with other Covenants and Conditions of re-entry for non performance, and then he devised the same land to the same Lessee for divers years after the first years expired, yielding the same Rent, and under the same Covenants, as in the former Lease, and he devised the remainder in fee to the Plaintiff, and the first Lease expires, and the Defendant being possessed by

*V. rest is rejected by Anderson  
fo. 179. b. 197.*

by force of his second Lease, doth not repair the houses; and if the Plaintiff might enter, was the question.

Shuttleworth. In as much as he devised the land under the same Covenants as the first Lease was, and the first was with Covenants and Conditions, the second shall be so also, the rather because he devised the remainder over, so that the Debtee cannot take advantage of the Covenants, but of the Conditions he may, and the second Lease is conditional. But the whole Court was against him.

Shuttleworth. To what purpose then are these words in the Devisse, Under the same Covenants.

Periam. They shall be void. And by all the Justices the intent of the Will was not that the Lease should be conditional, for Covenants and Conditions differ much, for the one gives an action, but not the other; but the intent was, that he should perform the Covenants upon pain to render damages in a Writ of Covenant.

Rot. 1620.

Bottenham against Herlakenden, 29 & 30 Eliz.  
in C. B.

**H**erlakenden was seized of land, and devised the same to the Plaintiff for years, the remainder to his wife for life, Proviso, that the Plaintiff should pay to the woman 20 l. per annum; and if he failed of his payment, &c. wherefore the woman entered, and if this shall be called reservation or reversion, was the question.

Anderfon. A man cannot make a Reservation on a Devisse.

Periam. A man may to himself and his heirs, but not to a stranger.

Anderfon. Every Devisse is in, in the fier by the Devisor, and why shall not this then be a reservation to the Devisor, and a grant of the reversion to the woman.

Gawdy. Wherefore cannot a man devise land, reserving rent, when by the Statute 31 H. 8. he may devise at his pleasure?

Periam. Because his pleasure must correspond with the Law.

Anderfon. If I devise land to another, reserving rent to me and my heirs, and then devise the reversion, he shall have the rent as incident to the reversion, and the Judges were divided, wherefore, &c.

Rot. 838.

29 Eliz. Glover against Pipe, in B. R.

**I**n debt upon a Bond the Condition was, that where Glover the Plaintiff had a Copyhold of inheritance, and had leased it to the Defendant, if the Defendant should not commit any manner of waste, and should do no other thing that should be forfeiture of the Copyhold, that then, &c. The Defendant pleaded conditions performed; the Plaintiff replied, and alleged waste committed in a shop that fell down during the term for want of reparation: but the Defendant in rejoinder alleged, that the shop was ruinous at the time of the Lease, and by reason thereof fell down.

Tanfield. It is no waste, as the Books are, 41 Ed. 3. 19 Ed. 3. 2 H. 7. 3. 12 H. 8. 11. 2. If a house be ruinous at the time of the Lease,



A lease, and fall during the term, it is no waste: yet the Book in 7 H. 6. is otherwise. And in the 1.2 H. 4. a man lets his house, promising that the Lessee shall not suffer any voluntary waste, if the timber be so good as it will endure the whole term, although it be not covenanted, yet is the Lessee bound to reforest it during the term.

Godfrey for the Plaintiff, and agreed to all the cases aforesaid. But here the Defendant is bound by his obligation, and therefore it differs from the case in 42 Ed. 3. 6. and of Perkins 142. where a diversity is between a waste and a covenant; for if a man makes a lease for years, and by hidden chance waste is committed, this shall excuse the Lessee: but if he covenant to leave the house in as good a condition as he found it, if the house fall down by tempest, yet he ought to re-build it. Also in this case it is a waste in Law, although the house were ruinous at the beginning of the Lease; for in a waste brought in such case, if he pleads nul waste fait, he shall not give such matter in evidence, but it is onely to excuse him. And with him agreed all the Court, and Judgement was given for the Plaintiff.

Austin against Courtney, 30 Eliz. in B. R.

Rot. 165.

**A**ustin and his wife, as daughter and heir of one Webb, brought a Writ of Error against Thomas Courtney to reverse a Fine levied in a base Court by the said Webb to himself.

Cook assigned these errors, 1. Because the Fine was levied de uno tenemento, which is not good for the generality, for it may be land, or common, or rent. And in 3 Ed. 4. a Plea in Bar was rejected, because it was pleaded that one was seized de uno tenemento, for this is uncertain. And in 38 H. 6. an Action is brought upon the Statute of 8 H. 6. for entry into certain tenements, that is not good, for it ought to be brought of so many acres. The second error was, because Webb the Conusor did acknowledge the land to be his right, whereas it ought to be the right of Courtney the Conusee. The third error was, because the Fine was levied in a base Court, which prescribes to hold Pleas but they cannot levy Fines there, for then the King shall lose his silver 50. Ains. And so was it adjudged between Bambury and Peres, that a Fine levied in Chester which had such prescription, is not good; wherefore Judgement was given that the Fine should be reversed.

Trinit. 30 Eliz. Ireland against Higgins.

Rot. 403, vel  
43.

**I**f an Action of the Case the Plaintiff declared, that whereas a dog came to the hands of the Defendant which belonged to the Plaintiff, the Defendant did assume to deliver the said dog to the Plaintiff upon request, and that the Plaintiff had requested him, and he did not deliver the dog, ad damnum, &c. and hereupon the Defendant demurred.

Leigh for the Defendant. There is no consideration; for when the Plaintiff is out of the possession of his dog, he hath lost his interest in him,

Trinit. 30 Eliz. Stone against  
Withepoole, in C. B.

him, for a dog is *feræ naturæ*, and therefore when he is out of possession, he hath no remedy. 22 H. 6. 10 H. 7. 16 Ed. 4. and he cited Fynes and Sir John Spencers Case in Dyer, where a Trespass will not lie for a hawk. Also, by the Grant of *omnia bona & catalla*, dogs do not pass, nor are tithable nor are Assets.

Tanfield contra: Horses, cows, and all cattel which are most profitable for service of man, were at first *feræ naturæ*, and so were dogs also: but since by use nothing is so familiar and domestick to man than is a dog, and then he cannot be *feræ naturæ*; and therefore a Trespass will lie for a dog, if he declare his dog, for that word does imply it is his domestick dog; and he much relied on a Book, the Roll whereof he had seen, Trinit. 15 H. 7. R. 35. where a man justified in a Trespass of Battery in defence of his dog. And in 2 Ed. 2. Avowry 182. a Replevin was brought of a Ferret. And in 23 Eliz. Leeks Case, where one had Judgement to recover great damages for a blood-hound. And as to the Case of Fines and Spencers, the reason why the Plaintiff had not Judgement was, because he did not shew that the hawk was reclaimed; but after he brought a new Action, and had great damages. And at last it was adjudged by all the Court that the Action is maintainable, and Judgement commanded to be entered, nisi, &c.

Rot. 771.

Trinit. 30 Eliz. Stone against Withepoole,  
in B. R.

**I**n an Action of the Case the Plaintiff declared, that J. S. was indebted to him for velvet and other things to such a value, and was bound in a Bond to pay money for them, and that afterwards the Defendant (being his Executor) did assume and promise to pay the money. The Defendant pleaded that the Testator was within age at the time of the making the Bond, and hereupon the Plaintiff demurred.

Egerton S. Il. citor for the Plaintiff. A Contract made by an Infant is not void, but voidable; and if the Infant at his full age had assumed as the Defendant hath, it had been good, and by the same reason the Executors assumption is good, 9 Eliz. 13. where the Lord Gray, being heir to the former Lord Gray, although he was not bound to pay the debts of his father upon simple contract, yet in regard he did assume to pay them, he was made chargeable. And in 15 and 16 E. 12. it is a good consideration where an Administrator undertakes to pay debts upon a simple contract: but admitting the Executor be not chargeable by Law, yet in equity and conscience he is chargeable in Chancery; and when he promiseth in consideration that the Plaintiff will not sue him, that is a good consideration.

Cooke: The consideration is the ground of every Action on the Case, and it ought to be either a charge to the Plaintiff, or a benefit to the Defendant; 17 Ed. 4. 5. where a man promised and assumed to a Chyrurgeon money for curing a poor man: that was a good consideration; for although it is no benefit to the Defendant, yet it is a charge to the Plaintiff, and where there is no consideration, there can be no good action; as where a man promiseth a debt that he never owed, this is void. And after, viz. 31 Eliz. It seemed to all the Justices,

sices, that the consideration was not good, and therefore the contract void: But if goods be delivered to an Infant to be re-delivered, if afterwards his Executor assenteth to re-deliver them, this is good.

Gawdy, in the 13 H. 6. If a man be indebted in a simple Contract, and dye, and his Executor assents to pay the debt, it is good: but this seems to be contrary to the Law, for it is contrary to that which hath been lately adjudged in the Common Pleas. And Egerton cited a Case, 10 H. 6. where an Infant brought an Action of Trespass, and submitted himself to an arbitrament, this shall bind him at his full age, and this was agreed by the Court, but differs much from the Case at Bar: for when an Infant commits a Trespass, he is chargeable in an Action of Trespass, and shall lose damages: but it is not so here, wherefore Judgement was given, that the Plaintiff should be barred.

Mich. 30 Eliz. Stanton against Chamberlain. Rot. 636.

**I**f an Action of Debt upon a Bond, upon non est factum pleaded, the Jury found, that the Defendant sealed the Bond, and cast it on the Table, and the Plaintiff came and took up the Bond, and carried it away without saying any thing; and if this shall amount to a Delivery by the Defendant to the Plaintiff, was the question. And it was resolved by all the Justices, that if the Jury had found that he had sealed the Bond, and cast it on the table towards the Plaintiff, to the intent that the Plaintiff should take it as his Deed, who took the Bond and went away, that had been a good delivery; or that the Plaintiff, after the sealing and casting on the table, had taken it by the commandment or consent of the Defendant: but because it is found that the Defendant onely sealed it, and cast it on the table, and the Plaintiff took it and went away with it, this is not a sufficient delivery, for it may be that he sealed it to the intent to reserve it to himself until other things were agreed, and then if the Plaintiff take it, and go away with it without the Defendants consent, that will not make it to be the Defendants Deed. But it was said, that it might be accounted to be the Defendants Deed, because it is found that he sealed it, and cast it on the table, and the Plaintiff took it, &c. and it is not found that the Defendant said any thing, and therefore because he did not say any thing, it will amount to his consent, Nam qui tacet consentire videtur. But to this it was answered, that it is not found that the Defendant was present when the Plaintiff took it; and if the Defendant had sealed, and cast the Bond on the Table when the Plaintiff was not there, and then the Defendant went away, and then the Plaintiff came and took it away, then clearly it is not the Deed of the Defendant.

1. 204. 140.  
3 Cio. 122.

Hill. 31 Eliz. Beron against Goodyne.

**I**f an Ejectment the Case was, the King was seized of lands in Fee, and a Stranger intruded, and the King grants this land to J. S. in Fee, and the Stranger continues possession, and dies seized: The question was, if this Defendant shall take away the entry of J. S.

Johnston.



Johnson. It shall not; for none will affirm that an Intruder shall gain any thing out of the King, but that the land shall pass to the Patentee, and the continuance of the Intruder in possession, and his dying seized, shall not take away the entry; for he cannot be a Disseisor, because he gained no estate at the beginning; as if a Guardian continues possession after the heir is of full age, he is no Disseisor, nor shall gain any estate. And 10 Ed. 3. 2. where a tenant of the King dies, his heir within age, and a stranger enters, and after the heir is of full age dies seized, this shall not take away the entry of the heir.

Cook contr. By his continuance of possession he shall be accounted a Disseisor, and the free-hold out of the Patentee, for another estate he cannot have, for tenant at sufferance he is not, for he comes in at first by a title, as in the 12 Affi. The Donk's in Frank-marriage are disjoyned, and the husband continues the possession; and so where a Lessee continues possession after the death of the tenant for life, these are tenants at sufferance; and the Patentee hath a free-hold in Law, which is taken away by descent, and denied there was any such case as was vouched in the 10 Ed. 3. but compared the case to the 21 Ed. 3. 2. where a fine was levied per consensum de droit come ceo, &c. if before the Comtee enters, a stranger enters, and dies seized, the entry of the Comtee is barred. So is it where an Advowson is granted to J. S. and his heirs, and a stranger usurps, the Grantee hath no remedy. And if a man deviseth land to J. S. and before he enters, a stranger doth enter, and dies seized, the entry of the Disseisor is taken away; and so it is in our case. But a further day was given Cook to shew cause why Judgement should not be given against him.

Rot. 33.

### Hillar. 31 Eliz. Suttons Case, in C. B.

**I**n an Ejectment, the Jury gave a special Verdict, that the Defendant (*nihil habens in terra*) did make a Lease thereof to the Plaintiff by Indenture, according as the Plaintiff had declared, and then the Defendant entered on the Plaintiff; and whether this entry be good, was the question.

Walmesley for the Defendant. Jurors are sworn *ad veritatem dicendum*, and therefore they shall not enquire of Escoppels, because it is not in evidence. But the whole Court was against him, who held that the Jury might finde a matter that is not shewed in evidence; for by Anderson, in an Affi. they may finde a Release, although it be not given in evidence; and he and Periam held, that the Plaintiff ought to have Judgement, for that there was a good Lease between the parties, and if Rent were reserved, an Action of Debt would lye.

Windham contr. For it is onely an Escoppel between the parties: but the Court is at liberty, and are not escopped, when the truth appears to them; and it is a Maxim in Law, that he who hath nothing in the land cannot make a Lease, and then the Plaintiff hath no cause of Action. And afterwards, viz. 31 Eliz. Anderson and Periam were expressly for the Plaintiff; for whereas it hath been said that it was a Lease by Escoppel, they held it was not so, for that in Debt the Rent should be recovered. And Anderson said, If I levy a Fine of your land to you for years, if you be put out, I shall have an Affi.; but Windham was of opinion with Walmesley; wherefore Periam said, we will have the opinion of the other Justices in the Exchequer Chamber; wherefore, &c.

Trinit.

Trinit 30 Eliz. Perryn against Allen in C. B.

Ror. 611. &  
612.

**I**f a debt upon a Lease for years, It was found that on Giblon was leased of Land in Lease for thirty years, and he let the Land to Perryn for 19 years rendering 10. l. rent, and that afterwards, it was articulated and agreed between Giblon and one J. S. that Perryn should have and hold the Lands which he had, and also other lands which he had, for term of 3. years rendering a greater rent, to which Articles Perryn at another time and place afterwards agreed, but the intent of the articles and agreement betwixt them, was not that the first Term to Perryn should be extinct. That afterwards Perryn letted this Land to the Defendant Allen for 17. years rendering Rent, and then the three years expired, and Giblon grants his term to J. S. who enters, &c. If this agreement amounts to a surrender, was the question.

Hanam, for the Plaintiff. It is not; for to a surrender three things are incident. First, an actual possession in him who surrenders. Secondly, an actual remainder or reversion in him, to whom the surrender is made. Thirdly, consent and agreement between the parties: But to all these, the Plaintiff was a stranger, and therefore no surrender. For if I let land to you for so many years as J. S. shall name, if he names the years, it shall be good from that time, and not before: but if I let land for so many years as my Executors shall name, this is not good, for I cannot have Executors in my life time, and when I am dead I cannot assent, so in this case there ought to be a mutual assent between the Lessor and Lessee.

Harris Cont. It is a surrender, for if he concluded and agreed at another time, or accepted a new Lease, it is a surrender. 37 H. 6. 22 Ed. 4. 14 H. 7. and then when a stranger does agree that he shall have other lands and pay a greater Rent, this is a surrender.

Anderson. If I covenant with you that J. S. shall have my land for ten years, this is only a Covenant and no Lease, quod Waimesley concessit. And so if I covenant that your Executors shall have my land for a term of years after your death, this is no Lease. And all the Court held, that this was not a good Lease, for the act of a stranger cannot make a surrender of the Term.

Peryam. You at the Bar have forgotten to argue one point material in the Case, videlicet. If Lessee for 20. years makes a Lease for ten years if the Lessee for ten years may surrender to the Lessee for 20. years. And Hanam said positively, that he could not surrender, for one Term cannot merge in the other. And Anderson said, that by opinion of them all, that the Lessee for 10. years cannot surrender. But to the other point. All the Judges agreed that it was no surrender. And Judgment was given for the Plaintiff.

Dabridgecourt against Smallbrooke.

**I**n an action of the Case, the Plaintiff declared that he was Sheriff of the County of Warwick, and that a writ came down to him to arrest J. S. at the suit of the Defendant, who requested the Plaintiff to make Russell, who was the Defendants friend, his special Bailly, in consideration of which the Defendant did assume, that if the said J. S. did escape, that he would take no advantage against the Plaintiff, where-

Z

upon

upon he made Russell his Bailiff, who arrested the said J. S. who afterwards escaped from him, and that notwithstanding the Defendant had charged the Plaintiff for this. And a verdict was found for the Plaintiff. And in this case it was agreed, that where a Sheriff did make a Bailiff upon request of any one, it is reason that the party should not charge the Sheriff for an escape, by reason of the negligence of such Bailiff: for the Sheriff hath security from every one of his Bailiffs to save him harmless: wherefore it is great reason that if upon request he makes a special Bailiff, that the party should not take advantage of such an escape, but that the Sheriff may have his action against him again, upon his promise. And Judgment was given for the Plaintiff.

## Hillar. 31 Eliz. Beale. against Carter.

Rot. 331.

I **P** an action of false imprisonment. The Defendant justified the imprisonment for two hours, because the Plaintiff brought a little infant with him to the Church intending to leave it there, and to have the Parish keep it: and the Defendant (being Constable of the Parish) because the Plaintiff would not carry the child away with him again, carried the Defendant to prison, all the said time, untill he took the child away with him. And hereupon the Plaintiff demurred. And it seemed to the Justices that it was no good plea: for although the Constable at the Common Law is keeper of the Peace, yet this does not belong to his Office, but if he had justified as Officer, then perhaps it had been good. And afterwards, viz. Hillar. 33 Eliz. the Case was argued again, and then Glanvill said. That it was a good justification, for any person may do it. For if I see A. ready to kill B. I ought to hinder him of his purpose. And in the 22 Aff. 50. the Defendant justified because the Plaintiff was mad and did a great deal of mischief, wherefore he imprisoned him. And in 10 Eliz. which case I have heard in this Court. The Constable took a mad man, and put him in prison. where he dyed, and the Constable was indicted of this, but was discharged: for the act was legal, and so herein this Case, if the infant had dyed for want of meat, it had been murder in the Plaintiff. For it was held in 20 Eliz. at Winchester before the Lord Bacon, if one brings an infant to a desert place, where it dyes for want of nourishment, it is murder.

Gawdy. It was all done of the Plaintiff, but that ought to be reformed by due course of Law, for a Constable cannot imprison at his pleasure, but he may stay the party, and carry him to a Justice of Peace to be examined.

Wray. When such matter ought to be pleaded. Quod Gaudie concessit.

Fenner. If he had pleaded that he refused to carry the infant away, then it had been a good justification, for a Constable is Conservator of the peace, but because it was not so pleaded the Plea is naught; But the Judges would not give Judgment, for the ill Examples sake, and therefore they moved the parties to compound.

Pasch.



Pasch. 31 Eliz. Sale against the Bishop  
of Lichfield in C. B.

**Sale** Executor of J. S. who was Grantee of the nomination and pre-  
sentation to the Archdeaconry in the County of Derby, brought a  
Quare impedit against the Bishop of Lichfield, and declared of a pre-  
sentment and disturbance in vita Testatoris, & quod Ecclesia vacavit &  
adhuc vacata est. The Defendant pleaded Plein d'Incumbent, before  
the writ purchased, and Judgment was given for the Plaintiff. And  
it was moved, If a Quare Impedit does lye of an Archdeaconry, for it  
is but a function or dignity, and therefore a Quare Impedit will not lie  
of an office of a Commissary, but the 24 Ed. 3. 42. is expresse in the  
point. And 30 Edw. 3. 21. a Quare Impedit did lye of a Priory. And  
therefore notwithstanding this exception, Judgment was given for the  
the Plaintiff. But there were two other doubts in the Case. First, If a  
Quare Impedit will lie for an Executor for disturbance done in vita Te-  
statoris, and that by the Statute of 4 Ed. 2. 7.

rest case reported by Andrey  
fo. 241. Case 257.

**Snigge.** The action will lye by the Executors, for in all Cases  
where damages are to be recovered, they shall have an action by that  
Statute. 11 H. 7. 2. An action of trespass was brought for taking of  
goods in the life of the Testator, but no action will lie for entrie into  
land in the life of the Testator, for it ought to be such an action as will  
survive in damages, and may be a damage to the Executor 7 H. 4. 2.  
An ejectment lies for Executors, upon an ejectment in the life of the  
Testator. And if an ejectment be maintainable in which a Terme shall be  
recover'd, it shall be also maintainable in a Quare Impedit, in which a  
presentment may be recovered.

**Drew cont.** At the Common Law Executors have no remedy for  
a personall wrong, quia moritur cum persona: for upon the death of the  
Testator, Executors have no remedy for arrears of Rent at the Com-  
mon Law, but only the Statute of 32 H. 8. And it cannot be that the  
Executors in this case are within the Statute of 4 Ed. 3. For that  
Statute intends onely to remedy such things as are available to the  
Testator, and are assets to pay debts: and although Executors may  
have a Quare Impedit, that is intended of a disturbance, facit al euz, but  
contra, if it be done in vita Testatoris.

**Walmesley.** I conceive no actions will lie. For the Statute gives an  
action for the taking of goods and such like things, but here is no taking,  
but only a disturbance, which may be done by Parol.

**Perryam Justice cont.** For the Statute, says that they shall have  
an action of trespass for a trespass done to their Testator, and not  
for taking goods, so that the taking of goods is but by way of resem-  
blance, and not that they shall have an action of trespass for taking of  
goods onely.

**Windham, and Anderfon.** agreed with Perryam, and whereas it  
has been said, that this cannot be Assets. But the case that the Te-  
stator had judgment to recover damages, shall not that be Assets? and  
why may the damages here recovered be Assets, and why shall not the  
grant of the Advowson be Assets in the hands of the Executor as well  
as in the hands of the issue. And so was the opinion of the Court.

32 Eliz.

32 Eliz. Foster and Wilson against  
Mapps. in B. R.

Rot. 7L

**T**he Case on a special verdict was thus, Mapps the Defendant made a Lease of the Parsonage of Broncaster by Indenture, and Covenanted by the same Deed, to save the Plaintiff harmless and indemnified: and also all the profits thereof and premises, against Philip Blount, the Parson of Broncaster; and hereupon a writ of Covenant was brought against Mapps, and the breach assigned was, that Blount had entered and ejected the Plaintiff. And one point was, if this shall be accounted the Deed of the Defendant, because the Defendant delivered his part of the Indenture to the Plaintiff as his Deed, but the Plaintiff did not deliver the counterpart to him. But the opinion of the Court was, that this was a good Deed of the Defendants, and Gawdy said, that the safest way had been to deliver his part as an Escrow to be his Deed, when the Plaintiff delivered the Counterpart: But a great doubt was made in this case, because it was not shewed that Blount entered by a Title, and then he shall be taken to have entered by wrong, and so the Covenant not broken, for to save harmless is only from legall harmes, as it is in Swettenham's Case Dyer 306. Where the Warden of the Fleet suffered a prisoner to escape, and took a bond of him to save him harmless, and then the Warden was sued upon an escape, and thereupon he sued the Obligation, and adjudged that the bond was not forfeit, because the parties was not legally in execution, and therefore the Warden could not be damaged for the escape.

Padly cont. The Difference is where the Covenant is generall, and where it is speciall, for in this case it being speciall to save harmless from Blount, he ought to defend against him his entry, be it by good title or by wrong; and so is Carterbies Case, Dyer 3. 28. Where the Lessee covenanted, that the Lessee should enjoy his terme sine ejectione vel interruptione alicujus, the Lessee brought an action of Covenant because a stranger entered, and did not say he had any title, and Judgment was given for the Plaintiff.

Gawdy. The Covenant is broke. For if Blount disturbs him so that he cannot take the profits, this is a breach of the Covenant, for hereby the Plaintiff is damaged. 2 Ed. 4. 15. where the Condition of a Bond was, that the Obliger should warrant and defend the Obliged for ever, and against all, and the Defendant pleaded, that he had such a Warrant, and thereto was held by Danby to be no plea, because he cannot warrant unless the other be impleaded. And there it was said by Danby and Needham, that if the obligee be outed by a stranger, who hath no title, the Obligation is forfeit by reason of this word defend.

Wray agreed, and said, that this case was not like to the Case of 26 H. 8. 3. where the Lessee Covenanted to warrant the land to the Lessee, for there he shall not have a Covenant, if he be wrongfully outed, but his case is to save harmless, which is of greater force than to warrant, for to warrant Land is only upon the title, but here, be the Lessee outed by wrong, or by title, yet is the Covenant broken, to which the other Justices agreed.

Fenger Mouchf. 18 Ed. 4. 27. where a man is obliged to save J. S. harmless

Elmer and his wife against  
Thatcher in C. B.

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harmless against me, if I sue against J. S. although innocently, the obligation is lost, which the other Justice denies, And at last Judgment was given for the Plaintiff.

Pasch. 33 Eliz. Elmer and his wife against  
Thatcher in C. B.

Rot. 1125.  
And Cooks 1.  
Inst. 355.

**I**n a Quod ei de forceat of a third part of an acre of Land whereof the wife was tenant in Dower: The defendant confessed she was tenant in Dower, but sheved how she committed waste, wherefore he brought his action of waste, to which she appeared and pleaded nothing, for which he had Judgment to recover. The Plaintiff said that no waste was committed, and the Defendant Demurred.

Statut Westm.  
2. cap. 4.

Owen for the Defendant. a Quod ei de forceat, lies not in this case, for such Writ is grounded upon a recovery by default in a real action, but a waste is a mere personal action. And therefore in the 2 H. 4. in a waste against the husband and wife, the wife shall not be received: also it will not lie in this case, because here is no default within the intent of the Statute, for the Statute intends to relieve defaults after appearance, and therefore all the Judgment in this Writ is that the recovery was by default, and if there was a default in pleading, it is a default, but not within the Statute.

Glanvill cont. No waste is committed, and so the recovery shall not bind, for it appears in the 8 Ed. 4. by West. That this action was provided instead of a Writ of right, and there is no question but a Writ of right will lie here, and this Writ is of the same nature. And Mr. Plowden in his Reading said, that this action will lie upon a recovery upon a Writ of waste, as well as in other actions, for the recovery is not upon the Inquiry of the Jury, but upon default. And it is also a real action 7 Ed. 3. 28 Ed. 3. 30. If the husband make default herein, the wife shall be received.

Anderson. There is no question but this action lies upon a recovery in waste, but if this be a default within the Statute is a doubt, for if this should be suffered, it were very mischievous: for then contempt shall be favoured, which was never the intention of the Statute, and therefore it will not lie where there is a default after appearance.

Walmesley. of the same opinion, for this case differs much from the Statute of Gloucester, for this Statute gives remedy to a third person upon default of the particular Tenant, and therefore upon this Statute, the intent of the party, who makes default, is more regarded, than the manner of the default, and therefore it shall be taken largely. But here is default in the party himself, and he shall have no favour against his willful default, for every nihil dicit, is a confession of it self, for thereupon it is supposed that nothing can be said.

Windham. I hold that a Quod ei de forceat will not lie in a Writ of waste, for the inquiry of the Jury is the cause of the Judgment. But he agreed that default within the Statute is intended such default, that in it self is the cause of the Judgment, but here the Judgment is given upon contempt and refusal of the party and therefore no favour.

Perrysm. This action cannot be compar'd to a Writ of right, which is grounded upon the right, and not on the Judgment, but the form in the Quod ei de forceat is set down in the Statute which ought to be observed, and the Statute gives this action upon a default, and here is no

default



default, for it cannot be a default where the party appears and hath no day in Court, but he doubted much if it lay in waste, because the damages are the principal: but as the case is here, it will not lie. And to prove that a nihil dicit is a confession he cited Pepys's Case in the Commentaries 438. And at last Judgment was given that the bill would not lie.

Pasch. 35 Elizab. James against  
Portman.

**W**illiam James and Thomas James Joynttenants for life of a Lease made by Portman, William James both assent, covenant and agree that Thomas James occupy all the land alone, and sow it with his own Corn: After the land is sowed Thomas James dyes, William James the Survivor grants the Coyne to Portman, who takes it, and the Plaintiff as executor to Thomas brought an action of trespass.

Ewens, for the Defendant, one Joynttenant cannot make a Lease to his companion, no more than one may infeod the other, by reason they have joynt possession 10 Ed. 4. 3. 2 R. 2. Extinguishment 3. Also the words here are not sufficient to make a Lease, but admitting this, yet the Survivor shall have the coyne of that part which belongs to him, for by this Lease the Joynture is severed, and then the Survivor shall have that which grows on his part: For if two Joynttenants sow their land, and one of them lets his myrtle for years; and he, who did not let, dyes, the other shall have the coyne as Survivor.

Pyne cont. Although one Joynttenant cannot infeod another, because he cannot make livery, because he hath possession before, yet may he Release to his companion, and so may he make a Lease for years, for there is no need of any livery, and by the 22 H. 6. 43. If one Joynttenant infeods another, this shall enure by way of confirmation. And 14 H. 6. 10. One Joynttenant may put out his companion by this means, for he may clayme a Lease from him, and then a Release, and if it be a good Lease, then the Executors shall have it.

Popham. The action is good, for one Joynttenant may make a Lease to the other, although he cannot infeod, for a Lease is but a contract. And 11 H. 6. 33. one Joynttenant commanded the other to occupy all, and in a trespass he was compelled to plead this as a Lease, and then if one Joynttenant does sow all and dyes, the other shall have the Coyne by Survivor; and it is not as in case where a man hath an estate determinable upon uncertainty, for there his Executors shall have the Coyne, but in our case, the Survivor had contracted with his companion, and thereby had bound himself not to meddle with the land, and the other bestowed great costs in manuring and sowing the Land, and therefore the Executors shall have the Coyne.

Fenner agrees, but doubted whether one Joynttenant could make a Lease to the other: but said, that by the contract he had excluded himself from the profits; and by the 29 Ed. 3. 27. one Joynttenant may have an account against the other. And he said, that if I agree that you shall sow my Land with me, you shall gain no interest in the land, and yet you shall have the coyne. And one Joynttenant may distress for himself, and as Waple for the other. And the Cause was adjourned: viz. Hilary 36 Eliz. the case was repeated.

Cawdy

And Gawdy said. That if there be two Joynttenants, and one grants to the other that he may sow the Land, yet may the other occupie with him, for these words do not transfer any sole interest, but if he sayes that he shall occupie all the Land, and shall sow it solely, this does exclude him from having any interest with him.

Popham. Agreed, because this is but a contract, and so of a Lease for years.

Gawdy. If one Joynttenant sayes to the other, that he will not occupie the Land with him, or that he will not put in his Cattle, this does not transfer any interest, but that he may occupie with him, and so in this case, if it had not been said that he should occupie solely.

Popham of the same opinion: for where he sayes he will not occupie, the words are in the negative, which will not exclude him of his interest, but in the Case at Bar they will, because they are in the affirmative so. That he shall occupie the Land solely. And Judgment was given for the Plaintiff.

**W**oodward, Parson of Wotton in consideration, of 120<sup>l</sup>. paid by Bretman, one of his Parthioners, did accord and agree with him, that he and his assigns should be discharged of Tythes during the time that he should be Parson. Bretman made a Lease to Nelson, Woodward did libell against him for Tythes and Nelson prayed a prohibition upon the said contract. And if this was sufficient matter for a prohibition was the Question, because it was by word only, and without writing, which amounts only to a cause of action upon a promise for Bretman, but no action for his lessees, neither can this amount to a Release of Tythes, for as Tythes cannot be leased without Deed, so they cannot be released or discharged without Deed.

Gawdy Justice. Tythes cannot be discharg'd without Deed, unless by way of contract for a sum of money, and he cited the 21 H. 6. 43.

Fenner: for that year in which the discharge was made, it was good by way of discharge without Deed, because the Parson for that year had as it were an Interest, but such discharge can have no continuance for another year, for default of a Deed; and so a promise being no discharge, it is no cause of a prohibition. But Gawdy, held as afoze. And about this time Wray Chief Justice dyed, and Popham succeeded, and the same day he was sworn, Cook moved this Case again. And the Court held that the agreement being by parol was not good: And Fenner, then, said that without writing the agreement could not be good between the parties but for one year. And the Court awarded a consultation. But upon search made, no Judgment was entered in the Roll.

Rot. 367.

Trinit. 35 Eliz.

Dr. Foord against Holborrow,  
in B. R.

**I**n an Action of Debt upon a Bond, the case was, W<sup>d</sup>. Drury (to whom the Plaintiff was Executor) made a Lease to Holborrow of the Mannour of Golding for years, and Holborrow the Lessee entered into a Bond, that if he, his Executors or Assigns, did pay to Anne Goldingham, widow, the sum of 20 l: for 17 years, if the said Goldingham should so long live, and so long as Holborrow the Lessee, or any claiming by or under the said Holborrow shall or may occupy or enjoy the said Mannour of Goldingham; and then Holborrow surrendered his Lease to the Oblige, *prætextu cuius* the Defendant pleaded, *quod non occupavit, nec potuit occupare, &c.* wherefore he did not pay the said sum to Anne Goldingham, and the Executor of the Oblige brought an Action of Debt upon this Obligation.

Johnson for the Defendant. The term is gone, for he cannot occupy after the surrender, and also the Oblige is a party to the cause why it is not performed, and therefore he shall take no advantage, 4 H. 7. 2. But the whole Court was against him, for he to whom the surrender is made, cometh in quodammodo by him, and is his Assignee, for he shall be subject to the charge that was before the surrender; and also the Defendant shall be bound by these words in the Obligation, *viz.* so long as he shall or may: and although these words were not inserted, yet he shall pay the annuity: for where the first Cause does comence in himself, he shall not have advantage thereby: but otherwise, where he is not party to the first Cause. As if two Joint-tenants with Warranty make a partition, the Warranty is gone, because they are parties to the act which made the extinguishment: but if one makes a feoffment of his part, the Warranty as to the other remains, 11 Ed. 4. 8. and in the Case at Bar, the Oblige made the surrender, and therefore he is party, and the first cause: and there is a diversity when the thing to be done is collateral, and when not: for if a Lessee does oblige himself to do a collateral thing, as payment of money, there he ought to do it, although that he surrender: for although the Oblige do accept of the surrender, yet no act is done by him to hinder the performance of the condition: but where the Oblige does any act to hinder the performance of the Condition, the Condition is saved: as if the Lessee be bound to the Lessor to suffer J. S. to enter into a Chamber during the Lease, and he surrenders to the Oblige, who will not suffer J. S. to enter, the Obligation is saved, and Judgement was given for the Plaintiff.

36 Eliz. Bedford against Hall, in B. R.

**I**n an Action of Covenant, wherein the Plaintiff declared, that the Defendant did demise and grant to him certain land, with all his goods contained in a certain Inventory for 20 years, and said, that in the Inventory, amongst other things, were five Cows, which the Defendant



tenant seized and that one J. S. took them away as his proper goods, as indeed they were, and whereupon he brought this Action.

Fenner. The Action will not lye, for no interest in the Cows both pass to the Lessee by this Lease, neither was there any right to them in the Lessor: As if I demise to you the land of J. S. by these words, Dem. h. & concessi. and you enter, and J. S. re-enters, no Covenant lyes against me. And so in the 11 H. 4. a Prebend made a Lease for years, and resigned, now is the term of the Lessee quite destroyed; and if after he be outed by a new Prebend, yet he shall have no Action of Covenant. And so is it, 9 Eliz. Dyer 257. Lessee for life makes a Lease for years, and dyes, the Lessee shall not have a Covenant if he be outed by him in the reversion, because he is not in as a Termor at the time of the disturbance. But if in the principal Case the Lessor had been possessor of the goods although by a wrong title and the Owner had seized them, then a Covenant would lye. And so if a Disseisor makes a Lease, and the Disseisor re-enters, the Lessee shall have a Covenant.

G. way. If a man lets lands wherein he hath no estate together with his goods although the land will not pass, yet the goods do, and if a man lets goods for a year, and re-takes them within the year, no Covenant will lye, for the property was never in the Lessee.

Clench. If a man lets anothers goods to me by Deed, if I seize them, and the Owner re-takes them, a Covenant will lye, and so will an Action on the Case, if it be without Deed, 42 Aff. 8. If I be in possession of anothers goods, and sell them, a deceit lyes against me by the Statute; and so is the Book of Aff. 42. 8. contra, where the Vendor hath not possession at the time of the sale. And if I sell goods by Deed which are in my possession, and they are evicted by the right Owner, a Covenant will lye: contra. If I have not possession at the time of the letting them, and if I let land, and J. S. enter before the Lessee, the Lessee cannot have a Covenant, Quod nota. Et adjuvancur.

**I**n a false Imprisonment, the Defendant justified, that he was High Constable of the Hundred of E. in the County of Salop, and that the Plaintiff made an affray within the said Hundred upon one Watin, who came presently to the Defendant, and told him of it, and took his oath that he was in fear of his life: whereupon the Defendant came to the Plaintiff, and arrested him and carried him to Prison untill he could finde sufficient Sureties of peace.

Glanvill. A Constable cannot arrest one to finde surety of the peace upon a complaint made to him, unless he himself sees the peace broken. 7 Ed. 4.

Kingmill contr. For he is at Common Law Conservator pacis, 12 H. 7. 18. and how can he keep the peace, if he may not compeill them to finde surety. 44 Ed. 3. Barr. 202. If a man that is threatened complain to the Constable, he may compeill the party to finde surety for his good behaviour, and may justifie the imprisoning him, or putting him in the Stocks, 22 Ed. 4. 35. 10 Ed. 4. 18. where a Constable in such case may take a Bond.

A a

Anderson.

Anderfon. I grant that Constables are keepers of the peace at the Common Law, and are to keep the peace as much as in them lyes; and that is, to take men that they finde breaking the peace, and to carry them to a Justice of peace to finde surety: but the Constable cannot take security, nor recognizance, nor bail, for he is not an Officer upon Record; and if he do take a Bond, how shall he certifie it, and unto what Court?

Walmesley contr. Who said, that the Constable might take security by bond, although not by recognizance or bail.

Beaumont. A Constable may put him that breaks the peace within the stocks, but it must be where the breach of peace is committed in his view, for he hath no authority to take an oath that a man is in fear of his life, and then the foundation of his justification doth fail.

Owen. The oath is not material; for although he cannot take such oath, yet his taking of surety is good; and before Justices of peace were made, the peace was preserved by Constables; and the Statute that creates Justices, does not take away the power of Constables, and therefore he may justifie. Sed adjournatur.

Pasch. 38 Eliz. Worley against Charnock, in C. B.

**I**n an audita querela the Case was thus. The father and son were bound in a Statute-Mercant to Charnock, who sued out an Execution against them, and their lands were severally extended; and they supposing that the Statute was not good, because it was not sealed with both their seals, according to the Statute, they both brought a joynit audita querela; and whether they could joyn in this Action, or not, was the question.

Warburton. They shall not joyn; for in all cases a man must make his complaint according to his grief; and here their grief is several, as if two men be imprisoned, they shall not joyn in a false imprisonment. The same Law in a Battery, 8 Ed. 4. 18 H. 6. 10 Ed. 4. If J. S. hath goods of others men, they shall not joyn in a Replevin; and 33 H. 6. two men shall not joyn in an audita querela, unless the land in execution is in them joynitly; and 29 Ed. 3. two Joynit-tenants Infants alien, they shall have several Writs of Cum suis infra ætatem: But he confessed the Case in 30 Ed. 3. Fitzherbert, audita querela, where two men were in Execution, and the Conusor did release to one, and then to another by another Release, yet both shall joyn in an audita querela: but this is not Law: and besides, they cannot recover damages joynitly, by reason of their several verifications; and this Action being personal, damages cannot be severed. Vid. 2 Ed. 3. Execution 45. 9 Ed. 4. 31. 12 Ed. 4. 6.

Harris contra. And as to the last reason, the Book in the 20 of Elizabeth is, that no damages shall be recovered in an audita querela, which (if it be Law) then is the doubt at an end. And whereas it hath been said, that they shall not joyn because their griefs are several, methinks there is no reason, but that if he that survives shall be charged with the whole, that they shall joyn also in their discharge; for if their charge be joynit, their discharge shall be joynit also. And in the 34 H. 6. and 30 Ed. 3. where an audita querela may be brought joynitly; and be resembled this to the Case of a Monstraverunt, where if a Tenant

in antient demerſn be diſcrepned, all the Defendants ſhall joyn, becauſe the grievance to one may be a grievance to all the reſt.

Yelverton of the ſame opinion. The ſuing of the Execution was the cauſe of the audita quærela, but not the ground, for the ground was the Statute-merchant, and therefore it is here brought according to the Statute.

Anderſon. If two men do me ſeveral Treaſaſſes, yet I may have a joynit Action againſt them, and the death of one of them ſhall not abate the Writ: but if two are Plaintiffs in a perſonal Action, the non-ſuit of one ſhall be the nonſuit of the other; and in our caſe the Statute was joynit, and alſo the Execution: then if all the Writs are ſo, the audita quærela which is to diſcharge them, ſhall be joynit alſo, eſpecially in this Writ where they are as it were Defendants; and therefore he reſembled this Caſe to a Writ of Error, or an Attaint brought by two joynitly, and one is non-ſued, yet this ſhall not abate the Writ, becauſe they are in a manner Defendants.

Walmſley contr. The Action ought to be brought according to the cauſe of the wrong, and the wrong began in ſuing the Execution, and that was ſeveral, and therefore the audita quærela ought to be ſeveral alſo: but if this Statute had been good, and had been diſcharged by releaſe or defeaſance, then the audita quærela might be brought joynitly, for then the ground of the execution was joynit: but here is but a colourable Statute, and the cauſe of the Action is not begun before the Execution ſued.

Owen and Beaumont agreed: and after by aſſent of Anderſon, Judgement was given that they ought to have ſeveral Writs.

Note, Paſch. 36 Eliz. in B. R. & Rot. 323. 02 521. between Curteſe and Overcot. If A. did recover againſt B. by two ſeveral Judgements, whereby B. is in Execution, it was adjudged that he ſhall not have one audita quærela, but two ſeveral Writs.

**I**n an Ejectment, the Caſe was this; A woman was Leſſee for forty years, ſub hac conditione, ſi vixerit vidua & inhabitaret ſuper prim ſſos: the woman dyed before the Leaſe expired, and her Executors entred, and being outed, they brought this Action; and the queſtion was, if the Leaſe were determined by the death of the woman, by limitation, or by condition, or if it yet remain.

Gawdy. It cannot be a condition, becauſe the ſentence is imperfect; for if a man makes a Leaſe for life, rendering rent, ſub hac conditione, that if the rent be behind, without any further words, this cannot be a condition, by reaſon of the imperfection of the ſentence; and without doubt, if a Leaſe for years be made to a woman, if ſhe ſolong live, and inhabit the premises, this is a limitation, ſo that the term is ended by her death.

Clench. It is neither condition nor limitation, for a condition ought always to be a full and perfect ſentence, and not uncertain. As a Leaſe for years, upon condition that the Leſſee ſhall pay 18 l. at the houſe of the Leſſor, this is a full ſentence: but a Leaſe made, rendering rent, and if it be behind, (and no more ſaid) this is no condition. And in all caſes where theſe words, quod ſi, do make a condition, it is re-



quists that these words, quod tunc, do ensue. Neither can it be a limitation, because the words, quod si, spoil the sentence. And Popham was also of opinion, that it was neither condition nor limitation: but if the words had been sub conditione quod tamdiu vixerit & inhabitaret, &c. this is a perfect sentence, and by her death, or not inhabiting, the estate might be determined; and he put this difference, that if a Lease had been for 20 years, si tamdiu vixerit super præmissos, the Lease had been determined by her death: but if a Lease had been for 20 years, si tamdiu inhabitaret, quamdiu vixerit, vel durante vita super præmissos; there if she dies within the term, yet the term continues, for in the first case the limitation goes to the interest, and in the other to the time; and Judgment was given, that the Plaintiff should recover, for that the term continued.

Michaelm. 37 & 38 Eliz. Mark Ives  
Case, in B. R.

**I**F a Debt upon a Bond the Condition was, that if the Obligee should go to Rome, and return from thence again before the 5. of July after the date of the Bond, that the Obligor should pay to him 20l. upon the 20. day of July at Pauls. And it was moved by Williams Serjeant, that if the Obligee returned within the time, whether he ought to give notice of his return to the Obligor, for otherwise by his secret return he may make a forfeiture of the Obligation; for if the Obligor of necessity be to tender this money without notice of his return, inconvenience would ensue; for perhaps the Obligee is not returned at the time the money is due, and then the tender is in vain, and the Law will not compell a man to make a tender, unless it be to some purpose, and therefore the Obligee ought to give notice, to the intent that the Obligor may know whether the money be due to him or not. And it is like a mortgage upon condition, that if the mortgager does pay 20l. before Michaelmas at Pauls, that then, &c. here the mortgager ought to give notice at what day before Michaelmas he will tender the money, or otherwise he cannot enter, for the time that the Law prescribes to make the tender, is the last instant before Michaelmas; and if the mortgager will make his election to tender it before the day, he ought to give the mortgagee notice thereof. And the Case of one Gurney was cited by Cook, Adjudge 27 Eliz. where a Lease was made for years, and the Lessor made another Lease for years, to commence after the surrender, determination, &c. of the first Lease, and then a private surrender is made to the Lessor of the first Lease, the second Lease shall not begin untill the Lessee hath notice of the surrender of the first Lease. But Tanfield said, that the Case was ruled contrary, and that the Lease did begin presently without notice, (ideo quære) and as to the principal point, the Court was divided. But Fenner said, that if the Obligee should give notice, perhaps the Obligor will not be found, and therefore good reason that the Obligor should make tender to the Obligee at his peril.

## Trinit 36 Eliz. Escot against Lanreny. in B. R.

**I**n an action on the Case the Plaintiff declared that the Lord Barkley by his Indenture, dimisit & ad firmam tradidit totam firmam suam totum & proficuum nundinarum & dierum Farialium infra manerium & Bergum de Thebury. for 21. years, and that the Defendant had disturbed and hindered him, from taking of divers pieces of Wool intra manerium & Bergum, prædicta &c. and after this joyned, exception was taken to the Declaration: because he declared of a demise made by the Lord Barkley, and did not set forth, that the Lord Barkley was seised at the time of the Demise 7 H. 7. 3. 34 H. 6. 48. But the exception disallowed by all the Court, because the Plaintiff in this action is to recover damages only, and the right of title of Land does not come in debate, but contra, if it were in such action where the right of the Toll did come in debate, and to prove this Glanvill cited 20 A. 4. 3. 47 Ed. 3. and 33 H. 6. and upon this reason he said that the Plaintiff of necessity is not bound to set forth the Market day, nor the quantity of the Toll. 34 H. 6. 48. Where it was pleaded that J. S. made a Lease to him and did not shew that he was seised, and yet held good.

Clench took another exception, because he did not set forth that Toll was to be paid by common usage for no Toll is due for Hens or Geese, or for many other things of such nature, and so it might be that Toll was not due for wool.

Fenner was of the same opinion, but Popham Contra, who said that the Plaintiff had declared that the Defendant had disturbed him from the Toll of divers pieces of Wool, and by that is implied, that Toll ought to be paid for Wool. And at another day Judgment was given for the Plaintiff.

Pasch. 36 Eliz. Sackford against Philipps.  
in Camera Scaccarii.

Rot. 484

**I**n a debt, this Case was moved by Williams Serjeant. A. is indebted to B. in 10 l. upon a Bond, and R. did promise to B. that if he would forbear A. that if A. did not pay him, he would, B. for non-payment by A. does recover so much in damages upon the assumpsit against R. If in Debt upon this obligation against A, A. may plead this recovery in Bar.

Walmley, he cannot, for he is a stranger to the recovery (ideo Quære) And it was assign'd for error that it was alledged in the Declaration, that the Defendant did promise to pay the 10 l. before Michaelmas, in consideration the Plaintiff would forbear to sue A. and that he hath forborn & adhuc abstinet, and does not say that he made request as he ought to have done. But the Court held it was well enough, and there is a difference when the Defendant does promise to pay generally and at a certain day named, there the Plaintiff ought precisely to alledge a request made in certain: but when the Defendant promiseth to pay at a day certain, he is bound to pay it at his perill without request, and therefore to alledge quod sepius requisitus, is sufficient without alledging a special request, otherwile it is if the Defendant assente to pay

pay it upon request, for there it ought to be specially pleaded. Another error was because the consideration was that the Plaintiff should forbear to sue A. and does not set forth for how long time, for perhaps the forbearance was but for a quarter of an hour.

Peryam. The consideration upon which an assumpsit is grounded ought to be of value, but of what value is it, where the forbearance is but for half an hour?

Fleming. By his promising not to sue, he is engaged never to sue.

Peryam. There is great difference between a promise not to sue, and a promise to forbear to sue, for a promise not to sue excludes him from suing at all, but a promise to forbear to sue, is only to forbear for a time; so that notwithstanding such promise he may sue after; and it being not here express how long he will forbear, there is no consideration.

Walmesley. There is a difference when the Defendant speaks the words, and when the Plaintiff. For if the Plaintiff says I will forbear to sue you, so you will promise to pay me, and upon this the Defendant makes a promise accordingly, the Plaintiff in this Case ought to forbear to sue him for ever. But if the Defendant only speaks the words, as here he does, If you will forbear to sue, I will promise to pay you, and the Plaintiff agrees and forbears a certain time, yet he may have his action afterwards, sed adjournatur.

Rep. 66.

Pasch. 38. Eliz. Stroud against Willis  
in B. R.

**I**n Debt upon a Bond, the Condition was: If the Obligor shall well and truly pay the Rent, or sum of 37 l. yearly at two leasts according to the tenor and true intent of certain articles of agreement indented and made between the Obligor, and Obligee during the terme therein mentioned, that then &c. The Defendant pleaded that these articles ut supra, contain that the said Stroud the Obligee, Dimisit & ad firmam tradidit to the Defendant, Omnia talia domus re-nementa & terras in Parochia de Petminster, de & in quibus, the said Stroud hath an estate for life by Copy according to the Customs of the Mannor. Habendum to the Defendant for 21 years, if Stroud should so long live, rendering to the said Stroud during the said terme 37 l. to be paid at the Castle of Canton; and pleaded further that at the time of the making the said Articles, the said Stroud had not any estate in any Lands, houses &c. in Petminster aforesaid, for the term of his life or by Copy. And upon this plea the Plaintiff demurred, and Judgment was given for the Plaintiff in the Common Pleas and now was removed by writ of Error. And in this Case were two questions. First, If nothing passe by these Articles, and so the reservation of the Rent is also void. Secondly, If the Obligation for payment of the said sum be also void; and it was said, that this could not be payable as a Rent upon the 14 H. 4. & 4. 20 Ed. 4. 20 H. 6. 23. for no Rent is reserved, because there is no land out of which it can come, and then the obligation is also discharged. 2. Admitting the Rent is not payable as Rent, then whether it be an Assumpsit to plead (as here is done) against the Articles, and therefore, they took a difference where the recital is general, and where



Pasch. 3. Eliz8. Holcombe against  
Rawlins. in B. R.

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where not; as if A. be bound to infeof me of all his lands of the part of his mother, and he hath no lands of the part of his mother: but otherwise if it were to infeof me of Black acre, so he shall be estopped to say that he had not Black acre, and so here he shall be estopped to say, that there are no Articles: but he may plead that he hath no land by Cople: Cook 2. Rep. 33. 6.

Fenner. When a man makes a voyd Lease, rendering Rent, the Reservation is also voyd, because the land is the consideration and recompence for the Rent: but where a man reserves Rent upon a grant or Lease, which grant and Lease are good, but the thing out of which the Rent is issuing cannot be charged with the Rent, there the reservation is good, as where a Rent is reserved out of an advowson or manse, but in the Case at Bar the Lease did never begin, and therefore Rent shall not, then is it to be considered whether the Rent is to be paid by reason of the bond, as a sum in gross or not, and as to that matter the condition of the bond is to pay the Rent according to the true meaning of the Articles, which is, that if the Lessee have not the Land, the Lessor shall not have the Rent, therefore it shall not be paid as a sum in gross.

Popham cont. But he agreed that the reservation was voyd, so if no Land do pass, no Rent is reserved, and the reservation only does not make any estoppel, and he took a difference upon the 14 Ed. 4. A man makes a Lease generally, and the Lessee is bound to pay the Rent in such manner as it was reserved, there such Rent ought to be demanded, otherwise the Obligation is not forfeit, and the demand ought to be upon the Land, but if such Lessee so years do oblige himself to pay the Rent at a Collaterall place out of the land, there he ought to pay it at his perill without any demand, so now he payes it in another nature than as Rent; so here if the payment had been limited at a place out of the Land, the Obligor is bound to pay it, although nothing were demised to him, so by the bond he hath made it a sum in gross. And it is altered from the nature of Rent upon the first reservation, and he is bound also to pay the Rent or sum, and if this be any of them, he must pay it: As to the second point: he made this difference. A his bound to J. S. to Release to him all his right which he hath in the Land descended to him, on the part of his mother; there, in Debt upon this bond, the Oblige cannot plead that he hath no right descended to him on the part of his mother, but must Release at his perill. But if he binds himself to infeof the Obligee of all the Land which he hath by descent of his Father, there he may plead that he hath no Land from his Father: so all may be Released, although the Release hath no right: but a scotment cannot be made of land which a man hath not.

Pasch. 38 Elizab. Holcombe against  
Rawlins. in B. R.

Rot. 401.

**I**n a trespass Quare Clausum fregit, with a continuando from the 31 Elizab. to the 36. the Defendant pleaded that J. S. was seised in fee and made a Lease to him &c. The Plaintiff replied, that long time before J. S. was seised, he himself was seised, until the said J. S. did disseise him; and J. S. being so seised did make the Lease to the Defendant so years, whereupon the Plaintiff recovered.

Tanfield.

Pasch. 37 Eliz. Wiseman against  
Baldwin, in B. R.

Tanfield. It appears by the Plaintiffs Replication that the Defendant was in under the title of J. S. viz. the Lessee of the Disseisor of the Plaintiff, and therefore he cannot be a Trespassor to the Plaintiff, notwithstanding his regress. 34 H. 6, 30. 37 H. 6, 35. 2 Edw. 4, 17. 13 H. 7. 15.

Ackinson contra. At the Common Law the Disseise being out of possession shall not recover any damages, but only against the Disseisor, and not against any other that comes to the land afterwards, and for this cause the Statute of Gloucester was made. But at the Common Law when the Disseisee re-enters, he is remitted, as if he had not been out of possession at all, and he shall have a trespass against the meane occupiers as in the 4 H. 7. A man was restored to his land by Parliament, as if he had never been out of possession at all, and he shall have a trespass against the occupiers that are in by title, as well as here he had against the Kings Patentee.

Gawdy. If a Disseisor be disseised, and the first disseisee enter, he shall have a trespass against the second Disseisor.

And Popham and Fenner agreed, but Clench cont. But at last adjudged for the Plaintiff. vid. Cook. 11. Rep. fol. 57. Lyfords Case, to the contrary.

Rot. 341.

Pasch. 37. Eliz. Wiseman against  
Baldwin. in B. R.

*1. R. A. 411.* **I**f a writ of error to reverse a judgment given in the Common Pleas, the Case was thus. Richard Baldwin did demise his land in Tale upon condition, that the Debisee, should pay to J. S. 20. l. and if he failed of the payment, that then the land should remain to J. S. and his heirs for ever, and whether this be a Condition in Law, that the heir shall take advantage of, or a limitation of the estate, so that J. S. shall take advantage, was the Question.

Gawdy. It is a limitation and not a condition as is apparent in Dyer, Wilfords Case 7. 128. and Pewis and Scholasticas Case in the Commentaries, and there is great diversity between an estate in Law, and a devise, in which the intent of the Debisor is to be observed, and here if this shall be taken for a condition, the intent of the Debisor is defrauded.

Clench agreed. For this should be as a new devise to J. S. and not as a remainder, as a devise to a Monk, the remainder to J. S. the remainder is not good, as a remainder, but as a new devise.

Fenner of the same opinion, and said, it had been so adjudged in this Court in an Attornies Case of Devonshire, and also in Sir Edward Cieres Case.

Gawdy. The received opinion of all learned Lawyers hath been such as hath been said, viz. that to the end the intent of the Debisor should be observed, it shall be a limitation. When I put this Case. A man deviseth his Land to J. S. upon condition, and for non-payment, he devises that his Executors shall sell the Land, if J. S. fail of the payment, it is cleere that the Executors may sell the Land.

Godfrey. I agree, because the Executors have nothing devised to them, but only an authority given them by the Will to sell.

Gawdy. But when the Executors have sold, the Tenant is in by the Debisor, and then it is no other than a devise to one in Fee on condition

of

of payment, &c. and if he fail, then to another. And the three Justices agreed; but because the Chief Justice was absent, it was adjourned to another day, at which time Fenner said, that he had spoken with Owen, one of the Justices of the Common Pleas, who said, he never agreed to the Judgment, but in case of a perpetuity. And therefore the Judgment in the Common Pleas was reversed.

The Earl of Lincolne against Fisher.

The Steward of the Leete being in Court, did say to Fisher who was resident within the precinct of the Leet, that he must be sworn for the Queen to make presentments at the said Court. To which Fisher replied, in saying I ought to be sworn, you lie. For which Fisher was fined at the Court 20l. And the Earl who had the Leet brought his action for the same.

Yelverton. The action will not lie, for he is not finable for such words, for they are no disturbance to the Court, nor hindrance of Justice: for this word, you lie, in ancient speaking is no more than to say, you do not say true.

Gawdy agreed that the action would not lie. But Fenner, Clench, and Popham contr. For this is a misdemeanour; for which the defendant is finable: for every Leet is the Queens Court, and a Court of Justice, to which respect and reverence ought to be given, and these words are in great contempt to the Court, and the authority thereof, which is supreme: And Polito, that he should here say to the Judge of a Court when he delivered his opinion in any Case. My Judge, you lie, without question he may be fined and imprisoned; and as it is of a Judge here, so is it of a Judge of any inferior Court, because it is a Court of Justice.

And Popham said, That if any mis demeaned himself in the Leet in any outrageous manner, the Steward may commit him.

And Gawdy changed his opinion, and herefore the Plaintiff had judgment to recover.

Pasch. 36. Eliz. Allens Case.

A Scire facias issued out in the name of the Queen, to the'w cause why execution of a debt which is come to the Queen by the attainder of J. S. should not be had: The Defendant pleaded that the Queen had granted over this debt by the name of a debt which came to her by the attainder of J. S. and all actions & demands, &c. upon which the Plaintiff demurred. And the question was, if the Patentee might sue for this in the name of the Queen, without speciall words. And two presidents were cited, that he may. 1. Pasch. 30. Eliz. rot. 191. in the Erchequer, where Greene to whom a debt was due, was attainted, and the Queen granted over this debt, and all actions and demands, and a scire facias was sued for him in the name of the Queen; also in the 32 Eliz. rot. 219.

Mabb of London was indebted by bond, and the debt came to the Qn. by the attainder, and she granted it to Bones, and all actions & demands, and a scire facias was issued out in the name of the Queen. And the principall case was adjourned: but the Patentee had express words to sue in the name of the Queen, although it was not so pleaded.



Röt. 438.

## 43 Eliz. Pelling against Langden. in B. R.

**I**s a trespass for breaking his Close, and killing 100 Conies. The Defendant justified, because he had common time out of mind, and because the Conies were damage feasant in the place where he killed them. The Plaintiff demurred, and judgment given for the Plaintiff: for Conies are beasts of Warren, and profitable as Deer, and are not to be compar'd to Hares and vermin which may be kill'd, but the Owner of the soil may keep Conies where the Common is as well as other cattle, also he may make fish-ponds in the Common, and the Commoner cannot destroy them Cook 5. Rep. 104. 22 H. 6. 39. & so it was adjudg'd.

Röt. 1295.

## Trinit. 43 Eliz. Gresham against Ragge. in B. R.

**I**s a trespass for entering into a house. The Defendant pleaded, that the Plaintiff was indebted to the Defendant in 100 l. and that he by the permission of the Plaintiff's servant, (the door being open) did enter to demand his debt: Upon which the Plaintiff demurred. And adjudg'd for the Plaintiff: for the servant of the Plaintiff could not licence any to enter into the house of his m'r. also a man cannot enter into another's house to demand money, unless the debtor be within the house.

Gawdy. If it had been shew'd, that the Plaintiff had been then in the house, the plea had been good.

## Hillar. 44. Eliz. Streetman against Everley. in B. R.

**I**s an ejectment, the Case was, a Lessee for 80. years upon condition, that if the Lessee his Executors or Assignes did not repair the house within six weeks after warning, that the Lease should be void the Lessee made a Lease for ten years, who suffered J. S. to occupy the house, and then the Lessee came to the said occupation of the house, and at the house gave notice, and said, that the house was defective in reparations and shew'd in what, and so gave warning to have it repaired, and after for default of reparations he entered, and the Defendant as servant to the Lessee re-entered: And his entry adjudg'd lawful, for notice given to J. S. who was but an Occupier of the house, and not Lessee or Assignee of any interest of the terme, was not sufficient; but it ought to be to the person interested in the terme, who is liable to reparations. Vid. Cooks 6. Rep. Green's case. Also the notice at the house is not sufficient, but it ought to be to the person of the Lessee, and Popham agreed to this.

Trinit.

Trinit. 1 Jacobi. Shopland against Radlen,  
in C. B.

Rot. 853.

2. Cro. 58. 98.

**I**f a Replevin the question was, when a Guardian in socage holds a Court in his own name; and does grant Copies in reversion; if this be a good Grant or not, and adjudged to be good against the Heir.

Walmesley. Dominus pro tempore of a Mannour may hold a Court, and make a Grant of Coppholds, but this is to be understood of perfect Lords, which a Guardian is not, but onely ad commodum hæredis, and is rather a servant to the Lord, than Dominus pro tempore; and he cannot be called Dominus, because he can neither grant nor forfeit his estate, and hath nothing to do to meddle in the Mannour, but to account for the profits: and a Writ of Ward does not lye for the land, but onely for the body.

Gawdy chief Justice. Warburton and Daniel Justices to the contrary. Who held, that a Guardian in socage is Dominus pro tempore, and that he hath interest in the land, and may make a Lease thereof for years, Commentar. 293. and may abate in his own name, 29 Ed. 3. Avowry 298. But a Guardian in socage cannot present to an Advowson, because he cannot be accountable. But Daniel Justice said, that the Guardian may present where the heir is not of years of discretion, and a Guardian in socage shall have a Trespass, and a ravishment of Ward, 24 Ed. 3. 52. and he hath the Ward by reason of looking to him, and therefore he hath interest sufficient to keep Court, and admit Coppholders, who are not in by him, but by the custome. But a Bailiff of a Mannour hath no interest, and therefore cannot make Grants and Copies: but a Guardian hath interest, provisione legis, although it be such interest as cannot be forfeit, and the heir cannot be at any prejudice, for he shall have an account made to him of such fines; for the heir himself cannot grant them, and the Law cannot compell the Guardian to occupy them; neither can the Court be held in the name of the heir, but the Guardian, and therefore he may grant Copies. And if a Guardian in socage hath such interest that he can make a Lease for years and his Lessee shall maintain an Ejectment a fortiiori, he may grant Copies. Neither is it any argument at all to say that a Guardian in socage hath no interest, because he cannot grant or forfeit his estate, for the reason is, because these things are annexed to his person. And after, Mich. 3 Jacob. it was adjudged, that the Grant was good, and shall binde the heir. Vid. Keloway, 46. 6.

37 Eliz. Brown against Hercey, in C. B.

Rot. 620.

**I**t was found by office, that J. S. who held the Mannour of D. of the King, did dye without heir; whereupon W. S. as heir to him, did traverse the said Office, and hereupon was at issue with the Queen, if he were heir or not: (and depending this suit) he made a Feoffment in Fee, with a Letter of Attorney to make Liberty, and after it was found for him against the Queen, and Judgement given

B b 2

against

against the Queen: but before the writ of Amoveas manum, the Attorney made Liberty, and adjudged good, for it cannot be said that the heir at the time of the Feoffment had nothing, or that the Queen at the time of the Liberty was in possession, for by the Judgement given, the possession of the Queen was utterly defeated, and possession in the party before any amoveas manum sued out, for that serves but to compel the Escheator to avoid the possession, if he hold the land after Judgement. Vid. Stanford, prerogat. 78. 10 Ass. 2. 10 Ed. 3. and the difference is where the King is seized by title, and where without title; for when the King is seized by title, and his title is determined, he ought to make Liberty to him that hath right: but when he is seized without title, and he who hath right hath Judgement against him, he may enter without Liberty, 5 Ed. 5. Quare impedit 34. But it was here said by Owen Justice, that if a man makes a Feoffment of White-acre, with a Letter of Attorney to make Liberty, and then he purchase White-acre, this is not a good Feoffment for White-acre.

Michaelm. 29. & 30. Eliz. Knowles against Powell,  
in Scaccario.

**T**he Queen seized in Fee, made a Lease for years to one who was out-lawed at the time of the Lease, rendering rent; and after he was out-lawed again, and before seizure, comes out the general pardon of all Goods and Chattels forfeited, and in this Case it was agreed, that a man out-lawed was capable of a Lease from the Queen, as Farmer to the Queen. And Manwood said, that the pardon with restitution is sufficient to reverse the term forfeited by the second out-lawing; and it was also agreed, that a man out-lawed and pardoned, had property in his goods.

Egerton Solicitor said, that in the 4 Eliz. it was adjudged in the Common Pleas, that if the Queen made a Lease under the Exchequer-seal to begin immediately after forfeiture, surrender, or expiration of a former term, and the Lessee is out-lawed, that the second Lease shall not commence, for it is a Royal forfeiture.

Rot. 185.

Trinit. 41 Elizab. Ferrers against Borough,  
in B. R. *Ex. 65. pl. 16.*

**U**pon a special Verdict the Case was thus, A man makes a Lease for years, upon condition that if he paid 10 l. before Michaelmas, that it should be lawful for him to re-enter; and before Michaelmas, he lets the land to another by Indenture for years, and then performed the Condition, and entered; the first Lessee brought a Trespass, and it was adjudged that it does not lie.

Trinit.



Trinit. 35 Elizab. Lambert against Austen,  
in B. R. *Crab. Eliz. 332. pl. 12.*

Rot. 185.

**I**F a Replevin the Case was thus; A man seized of land in Fee, grants a Rent-charge out of it to A. for life, with a Clause of Distress, and then makes a Lease to B. for years, and grants the reversion for life to J. S. the Rent becomes behind the 15 of Eliz. until the 18 of Eliz. and the Grantee makes the Defendant his Crecutor, and dyes, the term of B. ends in the 33 Eliz. and then J. S. enters, and makes a Lease to the Plaintiff; the Crecutor of A. distreyns for the arrearages, and the Plaintiff brings a Replevin.

Gawdy and Fenner. This Distress is well taken for the arrearages upon the Statute of the 32 H. 8. cap. 37. for the Rent doth not issue out of the term for years, but out of the free-hold; and upon grant thereof, as Littleton saith, the Tenant of the free-hold ought to attorn, and not the Termor; and so is it, 9 H. 6. and if an Assize be brought for this Rent, it ought to be brought against the Tenant of the free-hold, and all the Tenants of the free-hold ought to be named in a Rent-charge, by Cook, 6 Rep. 58, but otherwise for a Rent-service, for that is against the Termor onely, and a Termor cannot give seizin of the Rent to maintain an Assize, by Cook, 6 Rep. 57. and for the same reason Crecutors shall have an Action of Debt at the Common Law for arrearages, because the estate is determined, Cook, 4 Rep. 49. but an Abolition is given by this Statute, Onely so long as the land shall continue in the seizin and possession of the said Tenant in demesne And they much relied on this word (demesne) which ought to be intended of a free-hold; and of a Reversion upon a Lease for years, it is pleaded, quod seiscus in dominico suo, &c. and so cannot a Tenant for years say; for which reasons it seemed to them that the Distress was well taken.

Clench contr. For the Termor ought to pay it, for he takes the profits of the land: as if a Lease be made to a woman, rendering Rent, who takes husband, and dyes, the husband shall pay the Rent, by the 10 H. 6. for he hath taken the profits; and by the words of the Statute, they are (in the possession or seizin) and seizin refers to the Tenant of the free-hold, and possession to the Tenant for years; and the words are, (which ought immediatly to pay the Rent) and so ought the Termor in our Case, who is chargeable to the Distress of the Testator.

Popham chief Justice, of the same opinion. The Distress is not well taken; for he who hath the profits of the land, ought to answer for the Rent.

Gawdy. Although the Cattel of the Lessee be distrainable by the Testator, that is onely because they are upon his land; as a strangers Cattel may be so distrained, and therefore this proves not that the Lessee should pay the Rent. And if a man grants a Rent-charge, and lets the land at will afterwards, the Rent is behind, and the Grantee dyes, and the Lease at will determines, without question in that Case the Lessor is subject to the Distress of the Crecutor. And in our Case, if the Grantee had released to the Tenant for life, this had extinguished the Rent, otherwise of a Release to Tenant for years.

Fenner. If Tenant in Tail grants a Rent-charge, and after

makes a Lease for 21 years according to the Statute, and dyes, the Rent by the death of the Tenant in Tail is determined. To which Gawdy agreed; which proves, that the Rent issues out of the Freehold. Vid. Cook, 5 Rep. 118.

## Hillar. 37 Eliz. Butler against Ruddisley.

**I**n a Trespass, the Defendant pleaded the Freehold of Edward Devereux, and so justified as his Bailiff, without saying (at his commandment) the Plaintiff replied, that the said Edward was seized in Fee, and made a Lease to him, by virtue whereof he was possessor absque hoc, that the Lessor made the Defendant his Bailiff post dimissionem; and hereupon the Defendant demurred.

Crook. By this Lease a Freehold passeth to the Plaintiff, and then the Plaintiff's traverse is naught, for he hath now traversed that the Defendant is Bailiff, whereas he ought to traverse the Freehold in the Lessor, for that would have destroyed the justification of the Defendant. And to prove that the Freehold doth pass, he cited the Case of Littleton, where if a Lease be made to the husband and wife during Coverture, they are Joint-tenants for life. So in the 30 H. 6. a Lease to a woman, dum sola vixerit. And 14 Ed. 2. a Grant to a man till he be promoted to such a Benefice, or dummodo se bene gesserit, all these are Freeholds. And it is clear, that a Tenant at will cannot assign over. And also an estate at will is an estate at the will of both parties: but here it is at the will of the Lessor only, when he will make a Bailiff.

Haughton contr. An estate at will doth pass, and not a Freehold; for here he hath not pleaded that Liberty was made; and Liberty shall not be intended in this case, unless it be specially alleged: but if Liberty had been made, then he agreed that a Freehold conditional had passed; and for the pleading of a Liberty, he took a difference, that where an express estate either in fee or for life be pleaded, there Liberty shall be intended: but where a Freehold passeth by implication or operation of Law, and not by express words, there Liberty ought to be pleaded, as a Lease to one for years, the remainder to another for life, there Liberty ought to be pleaded. So in the 21 Assi. If a man pleads a Feoffment and Liberty within the view, he must plead Liberty within the view expressly; and so upon Grant of a reversion, attornment ought to be pleaded. And whereas it was said, that it cannot be an estate by will, because it was not the will of both parties. Vid. 9 Ed. 4. 1. and 15 Ed. 4. But Gawdy and Fenner denyed the diversity put by Haughton, for in pleading of an estate for life, all necessary circumstances in pleading shall be intended. And so it was agreed, that an estate for life should pass, for Liberty shall be intended. Sed adjournatur.

Pasch.

Pasch. 35 Eliz. Pendigate against Audley;  
in B. R.

Rot. 142.

**I**n a Writ of Error upon recovery of a Debt, the Error was assigned, because the Action of Debt upon the Obligation was brought against the Father of the Plaintiff, and in the Writ he was named the Son and Heir apparent of the Obligor, for this implies that the Father was alive; for if he were dead, then is the Plaintiff Heir in fact, and not apparent.

Gawdy. It is but Surplussage; and in the 12 Ed. 3. the Writ was good, although he was not named Son and Heir omnino. But this was denied, and agreed, that he ought to be named Heir; and Judgement was reversed.

Hillary 37 Eliz. Tanfield against Rogers;  
in B. R.

**I**n a Replevin, the Case was thus; Tenant in Tail seized of a Mannour with 3 Acres thereof in Demesne, makes a Lease of the three Acres also of the Mannour, habendum the three Acres, and the Mannour for 21 years, reserving Rent for the 3 Acres, and all other the premises, therewith demised 5 l. The question was, if this be a good Lease within the Statute of the 32 H. 8.

Stephens. This Lease is not within the Statute, for this Lease of 3 Acres, and of the Mannour whereof they are parcel, is an entire Demise, and not feodal, as in 13 H. 4. Grants 88. A man seized of a Mannour, with an Advowson appendant, makes Feoffment of one Acre of the Mannour; and then in the same Deed he grants the Advowson appendant, and not in gross, and yet they are in feodal clauses. Vid. 48 Ed. 3. 41. 33 H. 8. Dyer 48.

Gawdy and Clench. When the Lease is of three Acres, and of the Mannour, although the Mannour comprehends the three Acres, yet in construction of Law they shall be taken as feodal Demises.

Fenner. I am of the same opinion; and as I remember, in the 10 Affil. is this Case; A Lease is made of the Gift, and also of the Mill, reserving by the year 5 s. and for the other 10 s. they are feodal Leases; and so is it here. Note, that Popham was absent. But after in the same term he declared, that he agreed with the other Justices; and Judgement was given, that the Lease was good for the three Acres.

Pasch.



Pasch. 27 Eliz.

Carus Case.

**P**eter Carus was indicted for drawing his Sword in Westminster-hall, the Court then sitting, in resisting the Sheriff who was making an Arrest; and being found guilty upon his Arraignment, it did appear that this fact was done upon the stairs of the Court of requests, out of the view of the Courts: yet it was held, that being in the Hall, it was as much as if it had been in view of the Court. But because the Indictment was not good, for it was not coram Regina, as it ought to be, the Judgement was only to have perpetual Imprisonment, and to pay 1000*l.* Fine to the Queen. But if the Indictment had been as we have seen a president in 1 Ed. 4. then the Judgement ought to be, to have his hand cut off, and to forfeit all his lands and goods; and to have perpetual Imprisonment. 22 Ed. 3. 13. Cromptons Justice, 246.

Rot. 1741

Mich. 3 Jacob. Walgrave against  
Skinner, in B.R.

**I**n a Trespass, the Plaintiff declared that he was robbed of 20*l.* and that he pursued the Felon with hue and cry to such a Town, where he discovered the Felon to the Defendant, who was Constable of the said Town; wherefore he apprehended the Felon, and found the 20*l.* about him; which sum the Defendant took, and detained in his own possession. The Defendant contest the taking the 20*l.* ut supra: but because the Town was of no strength, he carried the 20*l.* to the next Town; and as he was going upon the High-way, he was robbed of it; and so he concluded that he ought not to be charged in this Action.

Johnson for the Plaintiff. It appears in 4 H. 7. that the Chief hath no property in the money which is found in his possession: and in the 15 Ed. 4. it is resolved, that if A robs B, and C robs A, yet C hath not gained any property; and if the Constable takes this out of his possession, he cannot seize it to any other use than to the use of the King; and therefore if he takes Felons goods, and does not keep them safe, the first Owner shall have a Trespass against him; for by the 21 H. 7. If a man does carry the Parson's tithe to the Parson's barn because it is like to perish, yet the Parson may have a Trespass against him. And by the opinion of Stamford, 44 Ass. If goods are taken from a Felon, and he will give sufficient surety, he himself shall have the keeping of them, or else the Town, and therefore the Constable hath no authority to meddle with them.

Erby contr. For a Constable is Conservator pacis; and preserving the peace does consist as much in keeping of goods, as of the body of a Felon. And here the Constable doubting of the strength of the Town by reason of the Inhabitants who were riotous, and of ill fame,

he thought it the best course to carry them to the next Town, and so no default was in him, for his taking and meddling with them was lawfull. And 21 Ass. 96. If a Felon flying be taken in any Village, the Bailiff thereof may take the custody of the goods; and I suppose that a Constable may keep goods as well as a Bailiff, for he is a minister of the Law; and if they be taken from him, he is no more chargeable than if goods were taken out of the possession of my servant.

Williams Justice, Pasch. 2 H. 7. Common fame is enough to apprehend any man; but if you arrest a person who is possessor of money, and he dye, you are chargeable with the money. And so here, although the taking of the Felon by the Constable be justifiable, yet he is to keep safe the money at his peril; and because he hath not, he is liable to this Action.

Popham. He might have pleaded not guilty: for he said, that if a Town hath the possession of my goods a Detinue lyes, and not a Trespass: but if a stranger takes them out of their possession, there a Trespass lyes; and therefore he conceived in this Case, that the Plaintiff should have brought a Trover and Conversion, and not a Trespass, quod ali Juiticiani concesserunt; and therefore the Case was deferred till next term, to be argued upon the general issue.

Mich. 3 Jacob. Jorden against Atwood, in B. R. Rot. 561.

**T**he Case upon the whole pleading appeared to be thus; A seized of a Messuage called Bodswich, had a way appendant to it in the land of J. S. in a Close called B. acre; after A purchased the said Close, and infeoffed the Plaintiff thereof; and this Action was brought by the Feoffees against the Feoffor; for using the said way; and the question was, if the way were extinguished, or not; and it was argued at the Bar, that unity of possession doth make no extinguishment. 3 H. 6. 31, where A prescribed to have a way to a Wood in a place called England; against which was pleaded, that time out of minde J. S. was seized of the said place, and of the said Wood, and held no plea. 21 Ed. 3. 2. 11 H. 7. 25. It was argued on the other side, that the Case of 31 H. 6. was a quare; and because the Feoffor had not reserved a way it did pass by the Feoffment.

Tanfield Justice, Unity of possession does not confound a way; and he cited 19 Ed. 2. 21 Ed. 3. 2. A way was appendant to a mill which was allotted to one partner. who assigned over her interest, and the Assignee brought an Assize of nuisance, and unity of possession was pleaded in Bar, but not allowed.

Yelverton Justice contr. For the 21 Ed. 3. 2. confirms my opinion; for Brook in his abridgement of the Case saith, that the partners have that as in case of a new Grant, which proves if they had it as heir, it should be gone. And the Case of Gutter in 1 H. 7. is onely by reason of the Custome. But here the Feoffor might have reserved his way upon the Feoffment, and it was his folly he did not.

Williams of the same opinion. And he took a difference between the Case of Gutter which is preserved by Custome, and the Case of a way

1092. Common which are extinguish'd by way of unity of possession, according to the 25 H. 6.

Fenner contr. For the case of a Way differs from the case of a Common, for unity will extinguish a Common, but not a Way, for then he shall lose the profit of all the land to which the Way is appurtenant, for without the Way he cannot use the Close, and therefore there is no reason that the Law should extinguish it.

Popham accorded. and took a difference between a Common appendant, which is of necessity, and a Common in gross; for in case of a Common appendant, if one Tenant of the Manor doth purchase the Feignory, and then grants over the Tenancy, the Common which he had before shall be still appendant, for it is not extinguish'd by the unity, but shall pass with the Tenancy: but otherwise of a Common in gross: and so he said was the same difference in this Case; for if the way be a way of ease or pleasure, there it shall be extinguish'd by unity; but if it be a way of necessity, there it is otherwise, for without it a man shall lose the benefit of his land or house. And he compared this ad viam Regiam, which lies by my house: yet if I do make a freightment of the land, I shall have a passage also. And he said, that if a man had three fields adjoining, and makes a freightment of the middle field, the feoffee shall have a way to this through the other Close, where it shall be most easy and beneficial for him. And at last, because the two Justices agreed, although others were of the contrary opinion, Judgement was given, Quod querens nil capiat per billam, and that the way is not extinguish'd. Vid. 11 H. 4. 5.

### Michaelm. 7 Jacob. Leigh against Burley.

**L**EIGH sued Burley and Cradock in the Court of Admiralty, whereupon a Prohibition was prayed. The Case was thus: Burley, Master of a ship, gave money to Cradock to buy Cloaths for him; Cradock bought such Cloaths for him of Leigh in the Parish of Saint Katherines near the Tower in London, whereby Leigh delivered the Cloaths to Burley in his ship that was in the Thames adjoining to Saint Katherines; and because the money was not paid, he sued Burley in the Admiralty Court; and a Prohibition was awarded for two causes; 1. because the Contract was made on land, and in re corpore committitur; and therefore the Admiralty can have no Jurisdiction: for the Statutes of the 1. and 15 of Rich. 2. and 2 H. 4. cap. 11. are, that the Admiral shall not have consueance but of things done super alium mare. Vid. Cook, 5 Rep. 107. And so was it resolved by the Justices; and they said, that the 15 of Richard the 2. is misprinted, viz. that the Admiral shall have Jurisdiction in the Bridges; for the Translatour mistook Bridges for Bridges, that is to say, the Rivers and. And Cook said, that the Admiral would have no Jurisdiction where a man may see from one side to the other; but the Governor of the County shall enquire of Felonies committed there, which was held to be given by all the other Justices: and



And he gave this difference, that where the place was covered over with saltwater, and out of any County or Town, there est altum mare: but where it is within any County, there it is not altum mare, but the Tryall shall be per vicinorum of the Town; Doderidge serjeant demanded this Question. The Isle of Lunday is de Corpore Comitatus of Devonshire and lies twenty miles within the Sea. Whether it is that within the County.

Foster. If the Sea there be not of any County, the Admirall hath Jurisdiction or els not. And note Cook and Foster said, that the Statute 25 H. 8. cap. 15. for criminal offences upon the Sea is to be intended if Felony be in per altum Mare; for if it be committed in a Creek or a place where the Admirall hath not Jurisdiction, the Commissioners have nothing to do to meddle with it. And the Prohibition was granted.

Michaelm. 7 Jacob. Mores against  
Conham in C. B.

**I**n an action on the Case upon an assumpsit, the Plaintiff declared that Lovet was indebted to him in a certain sum, for which he paid to the Plaintiff certain goods to the value of 100l. and the Defendant promised the Plaintiff to pay the debt, if he would deliver the pawn, and hereupon the Defendant demurred. And two points were moved, one to the joinder, and the other to the matter. First, the Plaintiff declared that the assumpsit was pro diversis bonis & Catallis delivered to Lovet without shewing what goods or of what kind, for this is the consideration of the contract, and therefore ought to be pleaded in certainty. But resolved by the Court that the plea was good: for the goods themselves are not to be recovered in this action nor damages for them, and so they are but collateral to the action, as in 10 Edw. 3. 30. In a *Writings*: the Court was for taking of Cattle, without shewing what Cattle, and the Jury found them to be two horses; and the Plaintiff had judgment; where note that a verdict did help an insufficient Count, and 11 A. 11. Ed. 3. a trespass was brought for taking away of *writings* concerning land, without shewing what they were, or the quality of the land: But otherwise in a detinue for *Charters*, for there the *Writings* themselves are to be recovered. The second and great doubt was when a man doth promise to another that if he will deliver the pawn, he will pay the debt, if this be a sufficient consideration to maintain an Assumpsit.

Foster Justice. It is not: for he that hath the pawns hath not such an interest in it as he may deliver it over to another, or make a legal contract for it, and that his delivery being illegal, he cannot by his own wrong raise an action to himself, and a man shall never maintain any action, where the consideration is illegal and not valuable, 9 Ed. 4. In an action on the Case the Defendant pleaded an accord, and that he delivered the writing to the Plaintiff which concerned the land, and it was held no plea, because the Plaintiff having land, the writings belonged to it. And cited Reynolds Case: where a man promised another 100l. to sollicite his business, and it was holden that no action would lie for

the money, because the soliciting his business was illegall, he being no man of Law. Dier 355, 356.

Cook, Warburton and Daniell cont. Who said, that the consideration was good, legall and profitable, and sufficient to maintain an assumption; for he who hath goods at pawn hath a speciall property in them, so that he may work such pawn, if it be a Horse or Ore, or may take the Cowes milk, and may use it in such manner as the owner would: but if he misuseth the pawn, an action lies, also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to a distress; if he detaineth it upon payment of the money by the owner as in the 2. assise. And was leased untill he has raised 100 l. he hath such interest as is grantable over. And Foster agreed to this, because he had power to satisfy himself out of the profits. And it was agreed by the Court, that if a man takes a distress, he cannot work the distress, for it is only the act of the Law that gives power to the distress, for he hath no property in the distress, nor possession in jure as in the 21 H. 7. Replevin. A man hath returne irreplevisable, he cannot worke them, for the Judgment is to remit them to the pound, ibid. remanurum. vid. 13 R. 2. Brook. 26 H. 7. 1. a. 34 H. 8. B. pledges 28. 22 Edw. 4. 11. goods pawned shall not be put into execution untill the debt be satisfied. And it was agreed by Cook and Warburton, that when a man hath a speciall interest in a thing by act in Law, that he cannot work it, or otherwise use it: but contrary upon a speciall interest by the act of the partie as in case of a pawn.

Daniell. There is difference between pawns, which are chargeable to the parties as Cowes and Horses, and things that are not chargeable, and also there is a difference between pawns that will be the worse by usage as Clothes, &c. For if the pawn be the worse by usage an action of the Case will lie against him that hath them pawned to him: But contra of goods that are not the worse for usage.

Cook. If I deliver goods to you, untill you are promoted to a benefice, you may use them, which Foster denied.

And Judgment was given for the Plaintiff, and that they may be granted over, and to a good assumption will lie.

## 26 Eliz. Earl of Northumber- lands Case.

This case was privately argued before the Lord Treasurer, because the parties agreed to refer themselves to the opinion of Wray and Anderson. And the case was this, the Earl of Northumberland devised by his will, his Jewells to his wife. And dyed possessed of a Collar of Ewes, and of a Carter of gold and of a Buckle annexed to his bonnet, and also of many other buttons of gold and precious Stones annexed to his robes, and of many other chains, bracelets and rings of gold and precious Stones. The question was if all these should passe by the devise, under the name of Jewells. And both Justices did Resolve that the Carter and Collar of Ewes did not pass, because they were not properly Jewells but ensignes of honour and State, and that the Buckle in his bonnet and the buttons did not pass, because they were annexed to his

his Robes, and were therfore no Jewells. But for all the other chaines, rings, bracelets and Jewells, they passed by vertue of the said Will.

Michaelm. 40 & 41 Eliz. Sperke against  
Sperke. in C. R.

Ror. 23176

**I**n an ejectment, the Case was this. M. Sperke made a Lease of the land in question to William Sperke for 89. years if William should so long live, the remainder after his death to the Executors of Assignes of the said William for 40. years: afterwards William dyes Intestate and administration is committed to Grace Sperke his wife, who entered claiming the 40. years, and the Defendant claiming by another Lease entered upon him, and he brought this action.

Anderson. Executor is as good a name of purchase as Heir is. And I conceive the points in this case are two. First, if the Administrator be an assignee. Secondly, If the lease for 40. years, be a Chattell vested in the Intestate in his life, for if it be, then his Administrator shall have it. And as to the first. I conceive that he is not assignee to take these 40. years. For in the 19 Ed. 3. It is there said that Administrators are not assignees, for administration is appointed by the ordinary and assignees must be in by the party himself and not by a stranger, and therefore an Administrator cannot be an assignee, as an Executor that comes in by the party, or as a husband for his wife.

Walmesley and Glanvill accorded. But Kingmill cont. for he said, that although one could not be assignee in Deed without the act of the party, yet one may be assignee in Law by the act of the Law. And so the opinion of the 7. Justices to the first point was, that the Administrator could not have it as assignee, and as to the second point. Anderson said, that it could not be: for if a man have a Lease for life, the remainder for 40. years, the remainder is void, because there is no person named to whom it is limited: but if a man make a Lease for life, and after his death to his lessee for 21. years, that is good, and the Executor shall have it as in right of his Testator. But where a man makes a Lease for years or life, the remainder after his death for 40. years to his Executors, the Executors shall have it as purchasers, for this word remainder divides it from the Testator, and makes the Executors purchasers.

Walmesley, Glanvill and Kingmill cont. And their chief reason was from the intent of the parties, and their intent was that the Lessee should have an estate during life, for it is to him for 89. years, if he so long live, and because by common intendment he cannot survive those years, their intent was that his Executors should have it after his death, and that the certainty of the time might be known it was limited for 40. years.

And Walmesley said, that the Administrator could not have this by purchase, for when a man takes by purchase, he must be named by an apt name of purchase, by which he may be known; as if there be tenant for life, the remainder to the right heirs males of J. S. and J. S. hath issue two sons, and the eldest hath issue a daughter, and J. S. dies, this daughter shall never take any estate, because she is not heir male, she



hath no name of purchase; and therefore here the Administrator cannot take by purchase; for the Administrator comes in by the ordinary; and therefore cannot be an assignee. And at last Judgment was given. That the Administrator should hold it, as a thing vested in the Intestate.

Rot. 366.

Michaelm. 41 & 42 Eliza. White against  
Gerish. in C. B.

**I**n a Replevin the Defendant avowed for Rent. The case was this. Two persons did joine in leavynge a fine to J. S. in Fee for comms de droit come ceo, &c. J. S. by the same fine renders the Lands to one of the Comors in tale, reserving Rent and further would quod tenementa predicta remaneret to the other who is the avower.

Walmesley. The Rent shall passe; as if a man grants land for life, and also grants quod tenementa predicta remanebunt to another, these words (Quod tenementa predicta) do make a grant of the reversion; and also these renders are as feveral fines, and so it shall be taken as a grant in tale reserving Rent, and after a grant of the reversion.

Gianvill accorded. Warburton. If a man makes a gift in tale reserving rent, the remainder over in Fee, the Donor shall have the Rent and not be in the remainder.

Walmesley. What is true in a grant, but not in a fine.

Anderion. If a man makes a gift in tale reserving rent, and at the same instant grants the Reversion, and the Deeds are delivered, accordingly, this shall passe as a reversion. And after it was adjudged to be a grant of the reversion, and that the rent passeth.

Crawleys Case

**I**n a Replevin the case was thus. A Rent is granted to two during the life of J. S. to the use of J. S. the grantee dieth, and if the Rent were determined was the Question.

Walmesley. The rent remains to J. S. for the grantees have an estate during the life of J. S. and by the Statute of the 27. 1. 8. the use is raten and consoid with the possession, whereby the Rent it self is carryed to J. S. whereby J. S. hath an absolute estate for his life, and the life of the grantees is not materiall. : as if Rent be granted to two for the life of J. S. if he does not grant over the rent, their lives are not materiall. And if they grant over and die, the Rent shall not cease, but the grantee shall have it during the life of J. S. And here the Statute 27. 1. 8. vests this in cestuy que vie, otherwise if it were before the Statute of use, quod fuit concessum per curiam.

Pasch

Pasch. 41 Eliz. Shaw against  
Sherwood.

Rot. 2504.

**T**he Executors of Shaw brought an Action of Debt for 20 l. upon a Will, and the Will was thus, I William Shaw have received of Thomas Pres 40 l. to the use of Robert Shaw and Elizabeth Shaw, equally to be divided; which said sum I acknowledge my self to have received to the use aforesaid, and the same to re-deliver again at such time as shall be most fit for the profit and commodity of the said Robert Shaw and Elizabeth.

Walmesley. Two points are here; First, if this be a Debt to cestuy que use, or to him who gave it. Secondly, if it be divided, so that each of them shall have an Action for 20 l. And as to the first, he held, that it was a debt to him for whose use the money was delivered; and as to the second that they shall have a debt as of several debts, by reason of these words equally to be divided.

Kingmill. Here is no Obligation, for the words are not obligatory, but onely an acknowledgement of the receipt. Glanvill accords.

Walmesley. When he acknowledges the receipt to both their uses, without question such Receiver is a Debtor. And agreed by the Court, that admitting it was a Debt, that then it shall be a divided Debt, and not joint. Quod nota.

### Lane against Cotton.

**I**n Debt upon a Bond, on condition to pay 20 l. within a month after, the Obligor had a son, that did or could speak the Lords Prayer in English, that he could be understood; the Plaintiff pleaded, that he had a son, qui loqui potuit pro nomine Domini, ut intelligi posset; and the Defendant demurred, because it was pleaded that he had a son qui loqui posuit, for that is a secret ability that cannot be known.

Kingmill. The plea is good, and shall be tried, as in case of a Will of non compos mentis.

Glanvill accords: for it may be proved by the testimony of those who have heard him speak; and if he ever spoke it, it is good evidence that he had ability to speak.

Walmesley contr. Because it is a secret thing, it cannot be tried.

Kingmill. Summ is bound by a Bond to give me 20 l. when the Return of Writ is returnable; it is a good plea to say that the Return is returnable, without saying that sum is bound upon it.

Here Barlow cited a Case adjudged in a Quare impedit by the Patron against the Bishop, who had pleaded that the Parsonages were benefices, and that they could not understand English, and that

that the Clerk he presented could not understand Welsh; and the Patron pleaded, that the Clerk could speak Welsh; and upon Demurr it was adjudged a good issue, and that such matter might be tried.

Anderion. The issue is good, and it is at the election of the party to plead quod loqui potuit, vel loquutus est. And if I am obliged to you to give you a 100 l. when I am able to go to Pauls, this may be tried, although in fact I never went to Pauls; and if I am able, I shall pay the money. And he cited Broughtons Case, where in maintenance the Defendant pleaded that he was peritus in legibus Angliæ, and that he was retained to be of Council, and adjudged no good plea, for he should alledge that he was student for a certain time, and was elected by the Benchers to be a Barrester. And Judgement was given for the Plaintiff.

Rot. 3267, or  
3667.

Michaelm. 41 & 42 Eliz. Swan  
against Gateland.

**I**n a writ of Ward, the Plaintiff demurred, that T. B. was seized of land in socage, and dyed; and J. B. his son is of the age of two years, and that the Guardianship belongs to him, because he is next friend ex parte matris J. B. viz. the brother of E. B. the infants mother. The Defendant pleaded, that E. B. the infants mother was his mother also, and that he was begotten by one Gateland on the said E. B. and the said Gateland dyed, and the said E. B. did marry the said T. B. and had issue the infant, and so concluded, quod erat propinquior amicus absque hoc, that the Plaintiff is propinquior amicus; and upon this was a Demurr.

Hera for the Plaintiff. The question is, whether the uncle shall be Guardian in socage, or the brother of the half blood; and he said, the uncle should have the Wardship, because there is a more natural affection between the uncle and the infant, than between the infant and the brother of the half blood; and if there be not love, he cannot be the procheine amy, although in judgement of Law he be the next of kin. 31 Ed. 3. Gawdy 157. In a writ of Ward, the Plaintiff declared that he was next of kin of the Plaintiff the mother of the infant, and it was pleaded against him, that the infants mother was alive; but he replied, that the mother had made a Charter of Freedom to the disinherison of the infant, and that she was attaind of Treason. And in 15 Eliz. the brother who claimed the Wardship of his younger brother, was also within age, and therefore it was ruled that the uncle should have the Wardship, because alterum nequit regere qui seipsum nequit. And 5 Ed. 6. the brother of the half blood is next of kin, to whom administration shall be given before the mother; for the Statute of 27 H. 8. 15 says, that the next of kin shall have it, and the brother of the half blood is the next of kin: but Guardianship shall be given by the Law to the nearest friend, and that is the uncle.

Williams contr. For although the brother be but of the half blood, yet he shall have the Wardship, for the brother is the next of kin, to whom the inheritance cannot descend; and the 31 Ed. 1. does not say

more 634 - Repd.  
H. 7 & Half blood  
to be Guardian.



gainſay this, for the mother was denyed the Wardſhip, becauſe ſhe was attaint of Treason: for the Law will not ſuffer that the infant ſhall be in Ward to any, who may be ſuſpected to do wrong to the infants land, or to his perſon, and therefore he ſhall not be in Ward to any that may inherit him, for there is a ſuſpicion that he may kill the infant. And 5 Ed. 6. Brook, Adminiſtration 47. It is agreed that the brother of the half blood is next of kin, and that is the cauſe of the nearneſs of love: and it cannot be intended that there ſhould not be love between perſons ſo nearly allyed. And 30 Aſſ. 47. a remainder was limited propinquieribus de ſanguine, and there it is agreed that the brother is next of blood.

Warburton contr. The uncle ſhall have the Wardſhip for two reaſons, for there is not ſuch natural love between two brothers of the half blood, as is between the uncle and the infant of the whole blood. Alſo, the Statute ſays, that he ſhall be in cuſtody parentum hæredis, and therefore he ought to be in cuſtody of thoſe who are of moſt ancient degree, who are the parents: but one brother cannot be parent to the other.

Walmesley contr. For the brother is the procheine amy; and ſo hath it been ruled in the time of the Lord Dyer, in 7 Eliz. in C. B. for he ought to be in Ward to him that is next of blood, and moſt remote in ſucceſſion. And the 5 Ed. 6. proves, that he is next of kin, and ſuch nearneſs muſt needs procure love: and although it ſometimes happens that there is not ſuch love, yet this cannot alter the Law that alwayes intends amity: and although the Statute of Mariburgh ſpeaks of parents, that is intended of ſuch as are of full age, and of ſound memory, for if he be not, then ſome other that is the next of kin ſhall have the Wardſhip: and he told Warburton, that he would ſhew him a report of ſuch a Caſe, where it was ruled accordingly before the Lord Dyer.

**I**s an Aſſent upon a ſpecial Verdict. the Caſe was this; John Burly ſet in Fee of land, with deviſe it to his wiſe for life, the remainder to William Burly in tail, the remainder to his next heir male, being of his ſurname. In Fee, and dyed, and then his wiſe does intermarry with William Burly, who had the remainder in Tail, and then they leyed a Fine come ceo, &c. to J. S. and by the ſame Fine J. S. reſcued to the wiſe for life, the remainder to the husband in Fee, and then a common recovery was had againſt the husband and wiſe, and that was to the uſes contained in the Fine: then the wiſe dyed, and the husband dyed without iſſue, and the right heir male of the ſurname of the Deviſor enters, and makes a Leaſe to the Plaintiff, who being outed by the Leſſee of William Burly, brought the Action.

Williams. Here are two points; firſt, if this be a diſcontinuance by the wiſe; ſecondly, if the recovery bars him in the remainder.

And as to the first point, when woman tenant for life, and he in the remainder in Tail being her husband, do join in a Fine, this shall not be a discontinuance of the estate Tail; for by Littleton, discontinuance cannot be by way of grant; although it be in case of a Fine, but ought to be by Livery. And as to the second point, Kniverons Case, B. 252. is express in the point, that notwithstanding the common recovery, yet the entry of him in the remainder is legal; for as to the point of recovery, a half Fee doth pass to the Conuser of the Fine, which is re-joynd back again to the woman for life, and her husband in Fee; and by the Common Law there was no remedy for him in the reversion against a recovery had against Tenant for life. 7 H. 7. 12. 5 Ed. 4. 2. until the Statute of Westminster the 2. which gives to him a Writ of ad terminum qui praterit, and by the Statute of the 23 of H. 8. he may enter: but now the question is, whether this recovery will bar him in the remainder of his entry, because the recovery was of another estate, and not against his Tenant for life. But I conceive that the issue is not in her former or ancient estate, but takes hereby a new estate; for if Tenant for life grants his estate to J. S. and his heirs, and J. S. grants a Rent, and then re-grants an estate to the Tenant for life, the Tenant for life shall be liable for the Rent, Dyer 252.

Harris contr. For by the rendering of the estate by the Fine, she shall be in her ancient state; and he cited the Case of Peter Cary here adjudged, who being Tenant in T. the remainder to the Earl of Devonshire, was attainted, and then the King pardon'd him, and gave him his land again, and then he suffered a common recovery, and thereby barred the remainder in the Earl of Devonshire.

But Anderson says against this Case, and said, that by the render the woman was in her ancient estate, and so the remainder discontinued, and the entry of him in the remainder taken away.

Warburton. The Fine does make no discontinuance, for they give away but that which they may lawfully do; and so is Bredons Case, Cook, 1 Rep. 67. and as to the common recovery, it is out of the Statute of the 32 H. 8. because she remains party to the Fine; and by the render upon the Fine, they shall be as in by a new estate, and then the recompence shall not be to the ancient estate, and therefore he in the remainder is not barred nor impeached by this Fine, but he may enter within five years.

Kingsmill accorded; for it is plain, that by the render to the husband and wife they are in a new estate, and the recompence shall go as to that, and not to the ancient estate; but contr. if it had been by way of voucher.

Walmesley accorded: but notwithstanding the Fine, and recovery, the entry of him in the remainder is good; and as to the woman, it is clear, that there is no discontinuance to him in the remainder in Fee, for he in the remainder in Tail cannot discontinue, because he is seized by force of the estate Tail, as the 2 H. 7. 17. Tenant in Dower, and he in the reversion in Tail, join in a Fine, this is no discontinuance of the estate Tail, because he was never seized, and therefore it is a recovery in the Tenant for life, although he in the remainder join'd with her, by the 21 Ed. 3. but otherwise if Tenant for life, and he in remainder in Fee, join in a Fine. Vid. Bredons Case, 1 Rep. 76.

Anderson. I conceive he in the remainder may enter, for all passeth from the Tenant for life, and it is her Feoffment, and the confirmation of the other, and so the estate Tail being spent, he in the remainder shall

shall enter for sequestration, and the recovery shall be no bar, because it was of another estate: and also this title of entry for sequestration shall not be barred by the common recovery, no more than if a feoffee upon condition does suffer a common recovery, yet may the feoffee enter for the condition broken: and Judgment was given for the plaintiff: so that his remainder was neither discontinued by the fine, nor his entry taken away by the Recovery.

43 Eliz. Hall against VWood, in C. B.

**I**n an Action on the Case for a Trover, and conversion of 40l. on not guilty pleaded, it was found for the Plaintiff.

Walmesley. How can an Action lie for a Trover of money, if it be not within a bag? for this Writ supposeth a loss; and when the money was lost, how doth it appear that the money found is the same money that was lost?

Davies. There are many precedents in the Kings Bench to prove that this Action will well lie for coin and money, and I have been of Counsel in many of those Cases.

Warburton. If the money were lost in view of a third person, upon such Trover the Action will lie, for there it may be proved that it was the money of the Plaintiff. And Walmesley agreed. And note, that a precedent was shewn, tempore 40 & 41 Eliz. inter Holloway and Higgs, which was thus; a master delivered to his servant 30 quarters of coin to be sold, and the servant sold them, and converted the money, and the master brought his Action on the Case for the Trover and conversion against the servant, who pleaded, not guilty, and it was found against him; and two things were moved in arrest of Judgment; first, that the master was never possessed of the money, and therefore could not lose it; secondly, because the money cannot be known, and so non constat whether it was the money of the masters, or no. But notwithstanding this Case, Judgment was given for the Plaintiff, because the possession of the servant was the possession of the master; and when the servant converts this to his own use, by this the master loseth the property, and is also a conversion in the servant.

Mich. 42 & 43 Eliz. Leeke against the Bishop  
of Coventry, in C. B. Rot. 3579.

**I**n a Quare impedit the Case was thus; Langford and Bussy were 3. Cro. 811.  
Patrons of an Advowson, to which they and their ministers use to present by turn. Langford presented according to his turn, and his Clerk dyed, and then Bussy presented in his turn also, and his Clerk was deprived, after which Langford grants his Advowson in Fee to Leeke the Plaintiff, and then the Bishop without any notice does collate Dr. Babington, who dyes; after whose death the question was, if Leeke should present, or Bussy; and Judgment was given for the Plaintiff, because that notwithstanding the Church was void by deprivation, yet the Patron may transpose his Advowson over.



## Bethell against Sir Edward Stanhop.

3. Cro. 810.  
2 And. 172.

**I**n Debt against Sir Edward Stanhop, as Executor to Francis Vaughan, he pleaded that he is not Administrator; and the said Vaughan gave 40 l. to his daughter within age, with power of revocation upon the payment of 20 s. and it was found that this was done to defraud Creditors, and then he dyed possessor of the goods, and the Defendant sold these goods, which made him Executor in his own wrong, and afterwards takes Letters of Administration.

Warburton. I conceive the Plaintiff ought to have Judgement, for the Statute of 21 Eliz. of fraudulent conveyances, annuls this gift of the Intestate, because he did it to defraud his Creditors, and then when he dyed it was Assets in the hands of the Administrator. And if a Testator have goods wrongfully taken from him out of his possession, these are not Assets to the Executors or Administrators: but if they be taken out of the possession of the Administrators or Executors, they shall be Assets, for they may take them again: but for goods taken from the Testator, they have but an Action. But here the Administrator may take the goods which were given by the Intestate to defraud Creditors, for the gift was void, and therefore they shall be accounted Assets. And as to the Action, it is well brought; for when a man does administer as Executor, and then takes Letters of Administration, it is at the election of the Plaintiff to sue him as Executor or Administrator, 9 Ed. 4. 33. 21 H. 6. 8. 2 Rich. 3. 20. 18 Ed. 4.

Walmesley agreed; for the Statute of the 27 Eliz. hath made void the Testator's gift, and sublat causa collatur effectus, and the gift being taken away, the property is also taken away from the Donee, and settled in the Donor, as to any Creditor: To which the other Justices agreed; and Judgement was given for the Plaintiff.

Rot. 1822.

## Trinit. 43 Eliz. George Brooks Case, in C. B.

**G**ibson recovered in a Debt against Brook, as Executor to J. S. 60 l. and 6 l. damages, and upon a scire facias to the Sheriff, he returns no Assets, and then upon the estate which was in London, which the Defendant had wasted and so. d. a scire facias was awarded to the Sheriff of London, with a Commission to the Sheriff of London, to enquire if he had Assets at the day of the Writ, &c. and by the Inquest it was found that he had Assets at the day of the Writ purchased, &c. and that he had wasted the estate, which was thus return'd by the Sheriff, against which the Defendant took issue that he had not Assets; and upon this was a Demurr.

Walmesley. A man may aburr against the return of a Sheriff, if the return be a matter collateral; as if upon a Carnias the Sheriff returns a Relous, there may be an aburrment against this, 4 Eliz. 212. a. But if it be in pursuance of the Writ, as non est inventus, there no aburrment shall be taken against this: but here the return is the saying of the Inquest, and not his own saying.

Warburton.

Warburton. I conceive he shall have an averment and traverse, or else he shall be without remedy, for he cannot have an Action on the Case against the Sheriff, because he returns that which was found by the Inquest, and so not like where the Sheriff returns falsly without such Inquest; and no attachment lyes, because it is but an Inquest of office; and after it was moved at another day, and a president shewn, 33 Eliz. in B. R. between Westner and Whitenore, and there it was adjudged that such return of the Sheriff was traversable: and Anderson and Kingmill agreed to it; wherefore Judgement was given for the Defendant, and that the issue was well taken.

### Day against Fynn.

**I**n an Ejectment, the Plaintiff declared of a Lease for years of a house and 30 acres of land in D. and that J. S. did let to him the said dwelling, and 30 acres by the name of his house in B. and ten acres of land there, five plus, five minus, it was moved in arrest of Judgement, because that 30 acres cannot pass by the name of 10 acres, five plus, five minus, and so the Plaintiff hath not conveyed to him 30 acres; for when 10 acres are leased to him, five plus, five minus, these words ought to have a reasonable construction to pass a reasonable quantity, either more or less, and not twenty or thirty acres more.

Yelverton agreed, for the word 10 acres, five plus, five minus, ought to be intended of a reasonable quantity, more or less by a quarter of an acre, or two or three at the most: but if it be 3 acres less than 10, the Lessee must be content with it. Quod Fenner & Crook concesserunt; and Judgement was made.

### Smith against Jones.

**I**n an Action of the Case upon an Assumpsit, the Case was; that the wife of Jones was Executrix to J. S. and had Assets to satisfy all Debts and Legacies. The woman dyes, and the goods remained in the hand of her husband, who was the Defendant; and Smith the Plaintiff being a Legatee, demanded his debt of the husband, who said to him, Forbear till Michaelmas, and I will pay you; and if this was sufficient cause of Action, was the question on a Demurrer.

Davies. The promise is void, because it is after the death of the wife.

Yelverton. The Action will lye, because he hath the goods in his possession, and therefore is chargeable, and must answer for them, and therefore there is a good consideration. And he cited Godfrey's Case, who laid claim to a Copphold, and the Coppholder in possession said to him, If the opinion of the Lord Cook be, that Godfrey hath a good title to it, I will surrender it to him; and because he did not surrender to him, Godfrey brought an Action on the Case, and it was adjudged that the staying of the suit was a sufficient consideration to have an Action on the Case.

Yelverton. If the promise had been to pay this Legacy in consideration he would not sue him, then it had been good.

Williams. If there be no cause of suit, there is no assumpsit, and here is no just cause, for he cannot be sued for Legacies.

Flemming of the same opinion, for the husband cannot be sued by the Plaintiff, and although perhaps the Legatee may sue him in the spiritual Court, yet that is only for the temporal administration, And afterwards Judgment was given for the Defendant.

Rot. 3648.

Michaelm. 9. Jacob. Kempe and James against Laurence in C. B.

**I**n a scire facias the case was thus, Gant having two daughters made his wife Executrix, untill his daughters came to the age of 21. years, or should be married, and then the Executrix should cease, and that then his daughters should be his Executors; and the woman did recover a debt upon a bond made to the Testator, after which the daughters married the Plaintiffs, and they brought the scire facias upon the said Judgment against the Defendants as terre-tenants, and the Sheriff return'd the Defendants terre-tenants, and no others, and upon Oyer of the scire facias the Defendants pleaded, that H. was seized of those lands die Judicii reddit, and made a Lease for years to them: Judgment, &c.

Nichols. The daughters shall have this judgment as Executors, for they are in p'sonity and in by the Testator, and are not like an Administrator who comes in by the Ordinary after the death of the Executor. 6 H. 8. 7. Cook. 5. Rep. Brudnells Case: and the daughters are Executors and subject to debts of the Testator. And as to the plea he said, that soasmuch as the Defendants are returned terre-tenants, they cannot plead that they are but tenants for years, and that their Lease is not warned: for the scire facias is a personal action to have execution, but of the goods: but in a real action it is a good plea, because the lessor himself cannot plead in discharge of such action 8 H. 6. 32. And note that Michaelm. 43 & 44. Eliz. Rot. 834. Judgment in the very same point was given accordingly.

Rot. 1246.

Trinit. 9 Jacob. Information against West. in C. B.

**I**n an Information upon the Statute of the 5 of Ed. 6. cap. 14. for buying of wheate-meale, and converting it into starch. It was resolved by three of the Justices (Cook being against it) that this is not within the Statute: but they agreed, that if one bought corn and thereof made meale or oat-meale, and sold it, that this was within the Statute, for that is usual, and is no alteration, and therefore remains the same corn, but starch is altered by a trade or science, which is



Is a mysterie, and so it is not the same thing that was sold. But Cook Chief Justice contra. And cited one Franklinghams Case Michaelm. 39 & 40 Eliz. in B. R. where one bought Barley, and because it was of such Quantity that he could not make malt of it in his own house, he made malt thereof in anothers house by his own servants. And it was resolved.

First, That the conversion of coyn into malt, in his own house, with an intent to sell it was within the Statute, unless there be a saving for it.

Secondly, Forasmuch as it was in anothers house, he is out of the proviso, and so within the penalty of the Statute. And in Pasch. 42 Eliz. between Reynolds and Gerret. That if a Miller buys corne, and grinds it and sells it within his house, this is within the Statute. And in the Chequer Chamber in a writ of Error there between Baron and Brile, adjudged there, that a Coster-monger, who buys Apples to sell them again was out of this Statute, because they are necessary victuall. And others exceptions were taken to the Information: viz. where he saith Ligamen anglice Starch, whereas there is no such word, but it is Ligumen, and the anglice will not help this mistake. Cook 10. Rep. 134. and this exception was taken by Justice Winch.

But Warburton Justice cont. for Starch is a thing newly devised, and there is no Latin word for it, and therefore the anglice there is good.

Postor Justice took an exception, because the Information concluded contra formam Statuti, whereas it ought to have been contra formam Statutorum. For this Statute was of force until the 8 Elizab. and then was determined until the 13<sup>th</sup> of Elizabeth, and then it was revived, so there are two Statutes; but it was agreed, that where a Statute continued de tempore in Tempus, and was never discontinued, nor determined, there it shall be said contra formam Statuti, and this diversity hath been twice adjudged upon this very Statute. viz. 9 Eliz. in Palmers Case, and in the 39 Eliz.

Warburton. cont. for the Information doth intend only the Statute of 5 Ed. 6. and 14. and he did rectie the words thereof in his Information: also this Statute only makes the offence and declares the manner of it, and no other Statute makes any addition to it, or increaseth the penalty, but only revives it to endure in perpetuum. But if a Statute doth prohibit a thing, and another Statute gives a penalty, thereupon Information upon the penalty, both Statutes ought to be rectied and to conclude contra formam Statutorum, vid. Commentar. 106. Morgans Case. And in the Statute of Usury, 37 H. 8. inserted the 1<sup>st</sup> Eliz. and an addition made to it, there such inclusion ought to be contra formam Statutorum, but where the Statute is only revived, it is otherwise: as the Statute of Usury; Eliz. was continued until the 14 Eliz. and then it was determined, and 27 Eliz. was revived, yet all Informations upon that Statute, are contra formam Statuti; 5 Elizab. Cook. This is no good exception and cited Talbot and Sheldens Case. Hillar. 33. Eliz. who were indicted for Receivency contra formam Statuti 23 Eliz. and in a writ of Error, the Judgment was reversed, because the penalty was demanded: for the 10<sup>th</sup> Eliz. made the Offence, and the 23 Eliz. gave the penalty, but if the Information be for the offence only, there it had been good. See the new Book of Entries 182. but if there be divers Statutes in the point of Information contra formam Statuti is good, because the best shall be taken for the King, Vid. 5 H. 7. 17, 8 Ed. 3. 47. 2.

Pasch. 10 Jacob. VValler against the Deane  
and Chapter of Norwich.

**I**n an action of Covenant the Plaintiff declared on a Lease made from the Deane, the Case was this. The Deane in the 38 Eliz. had made a Lease for 99 years, to one Themilthorpe, and then in the 42 Eliz. made a Lease to the Plaintiff for three lives, rendering Rent, with a Letter of Attorney to make livery, and a Covenant to save the Plaintiff harmless against Themilthorpe, afterwards the Attorney makes livery i.e. after Michaelmas which was a Rent day, and he being disturbed by Themilthorpe, brought this Covenant. And two points were moved in the Case,

First, Inasmuch as the Lease was void to Walter, whether that the Covenant was void also.

Secondly, If the livery made after the Rent day be void.

Hoghton Serjeant, If the Covenant depended on the interest of the Lease, as a Covenant to repay the thing devised, or to pay rent, these had been void, because the Lease it self is void, for they do immediately depend upon the Lease, but where the Covenant is for a thing collateral, as a Covenant that the Lessee is owner at the time of the Lease, or that the Lessee shall enjoy it, or shall be discharged and saved harmless, these Covenants being collateral to the Lease and interest are good, although the Lease be void, and the 43 Ed. 3. proves this: where a Lease was made by a Baron and Feme, a Covenant by them shall not binde the wife, contra where the Covenant concernes the interest, as payment of Rent, &c. Also the Covenant was broken immediately upon the sealing of the Lease to the Plaintiff. And as to the second point, he held it was a good livery, because no time was limited in the Letter of Attorney.

Dodderidge Serjeant; The Covenant is void, because the Lease is void, but contra, if it had been a Covenant to enjoy for three lives, and he relied much on the difference between tempus annorum and terminum annorum in Cook 1. Rep. 124.

Nichols cont. The Covenant is good, and yet in force, for when an estate is created in which is implied a Covenant in Law, there if the estate be void, the Covenant is void also, but when there is an express Covenant in Deed, there it is otherwise, although the Lease be void or voidable, as if he Covenant that the Lessee shall enjoy during the terme, and the lessee resign, yet is the Covenant good although the terme is gone. And as to the second point. The livery is good, for untill the livery be made, the lessor shall retain his land, and no Rent is due. vid. Commentat. 423. for by interment the possession is better than the Rent. And Cook agreed to this. And the Justices agreed with Nicholls.

Trinit:

Trinit. 10 Jacob Barnes Case.

**T**enant for life the Reversion in the Lessor, a Formedon is brought against the tenant for life, who prays in aid of him in the remainder for life, without him in the Reversion.

Warburton. I conceive he shall have the Ayde 7 H. 4. 2. where ayde is prayed against him in the Remainder and Reversion, and he cited a Manuscript 11 R. 2. direct in the point that the ayde would lye. But the other Justices cont. for the Tenant for life hath as high an estate as he in the remainder, and may plead all that the other may, but if there be Tenant for life, the remainder in Tale, there he shall have ayde of the Tenant in Tale. 23 H. 6. 6. 11 Edw. 3. 16. If there be Tenant for life, the remainder for life the remainder in fee, tenant for life shall have ayde of them both, for else he in the remainder shall not come in to plead. 11 E. 3. ayde 32. Where it is resolved, that tenant for life shall have ayde of the Reversioner for life.

Hillar. 28 Eliz. VVatkins against  
Astwick.

**A**gan makes a testament on condition that if he, his heirs or Executors do pay the Rent of 100 l. before such a day, that he may re-enter, the Feoffee dies, his heirs within age, the mother (without any notice of the son) requests J. S. that he would pay the money for her son. And all this was found by special verdict, but it was not found of what age the son was.

Clinch. If the Jury had found that the son was of the age of 17 years, the payment had been good.

Wray. If a Bond be upon condition that the Obligor or his heirs should pay 100 l. and the Obligor dies, his heirs within age, I conceive payment by the Guardian, or by some other friend is good. And afterwards all the Justices agreed. That if the Infant were within the age of 14. years, the tender of the money by his mother had been good, but contra, if he had been more than 14 years, and because no age was proved here, but that he was within age, it shall not be intended that he was within the age of 14. years. and therefore they advised the party to begin de novo, and that it may be found that the Infant was within the age of 14. years.



Trinit. 25. Eliz. Moris against  
Paget. in C. B.

Rot. 2317.

**I**n a Replevin, a speciall Warrant was found, that Sir Francis As-  
cough was seised of the *spanno* of Castor in Lincolne, which *spanno*  
extended it self into four Towns v. z. Castor, North Kelsey, Dale, & Sale:  
and that there were demesne lands and freeholders in each of the said  
Towns, and that Moris the Plaintiff held the land where, &c. by Fealty  
and suit of Court to the *spanno* of Castor, and the lands did lie in one of  
the Towns viz. in North Kelsey: And Ascough being so seised, sold to the  
Defendant Totum illud Manerium sive Dominium de North Kelsey cum  
pertinentiis in North Kelsey, ac omnia ac singula Messuagia, redditus,  
Herriot, and all other things asen or reputed as parcell thereof, with all  
Courts, &c. To have and to hold to the Wendes and his heires: and  
Moris the Plaintiff and other freeholders in North Kelsey, did attorne  
to the Wendes. The Question was, if the Wendes had the *spanno* of  
North Kelsey, or not.

Peryam, He has not; yet by the feotment and attornment all the *We*-  
nants and services are conveyed to him: but not as a *spanno*: for a  
*spanno* is made and incorporate by continuance of time, and this en-  
tire *spanno* of Castor cannot be divided no more than other liberties;  
as if the King grant to thre partners, who have thre *spannos*, a  
Leet or Warren, and one of them makes a feotment, the feoffee shall  
not have the Leet, and he cited Dyer 362. a. and he sayd, if I grant my  
*spanno* of Dexept certain Demesne lands and services, the feoffee shall  
have the *spanno*, and I shall have the lands and services in gross: and  
so if I have a *spanno* that extends into two Towns, and I grant my  
*spanno* to you in one Town, you shall have no *spanno*, but the lands  
and services in gross.

Windham Justice cont. For where he grants his *spanno* of North  
Kelsey in North Kelsey, there it shall be construed his *spanno* in re-  
putation.

Anderson agreed, for although a *spanno* cannot be created at this  
day, yet is it not so intire but it may be divided.

Hillar. 30. Elizab. Sir Thomas  
Howards Cafe.

**A** man makes a Lease for years the 10<sup>th</sup> of May, and then the Les-  
see bargains and sells this to another by Deed enroll'd, bearing  
date the 10<sup>th</sup> of Aprill, and it was entred to be conveyed the 10<sup>th</sup> of  
Aprill before, but in truth it was delivered and acknowledged and en-  
rolled afterwards: And it was held that the bargain was without re-  
medy at the Common Law, for he cannot plead that it was acknowl-  
edged or delivered after the date of the day of acknowledging it, and so  
was the opinion of Rhodes.

Peryam and Windham, Anderson being absent: for he cannot aver,  
that it was inrolled or acknowledged at another day then it is recor-  
d.

red, because it is contrary to the Record, for it is entered, that it was acknowledged the 10 of Aprill, and then if such a plea should be admitted, it would shake most of the Assurances in England.

Note, shuttleworth put this case. A man makes a Lease, rendering Rent at two Feasts, and if the Rent be behind at any of the said Feasts or 40. dayes after, and no distress to be found, that the Lessor shall re-enter, the Lessor comes upon the ground the last day of the 40. and demands his Rent, and because no distress was found on the land at the time of his demand he enters. But it was objected, that alwayes before this day there was sufficient distress, and the question was, if his entry were good.

Fenner and Rhodes said, they had seen a Report of the same Case. 8 Eliz. That the distress ought to be on the 1. and on the last day, even at the last instant of the day, which is a full time to make a demand, or else the Lessor may enter.

Walmesley. The same Case was resolved a year agoe in the Kings Bench between Ward and VVare. But it was there, (and no distress to be found at any time within forty dayes) there if there be a distress found at any time, it is sufficient. Vid. r. Inst. 202. 2.

## 28 Eliz. VWood against Ash,

In a Replevin, the Case was thus. Pattenham made a Lease of Land with a Stock of Sheepe for 20. years rendering Rent, and the Lessee with Covenant to render back to him at the expiration of the Lease 1000. Sheepe of the age of three or four years; and that the Lessor grants all his Chattells, and this Stock of Sheepe to Elizabeth VVava for the Defendants now wife: but in Truth, the Sheepe of the old Stock were all spent, and others supplied, part by increase, and part by buying of other Sheepe.

Walmesley, for the Defendant. The grant made by the Lessor is good, for the generall propertie does remain in him, although that the Lessee hath a speciall propertie. To which it was answered, that if the ancient Stock of Sheepe were still, it had been good; but it was not, and therefore the grant is void.

Walmesley. Although the first Stock was changed, yet the new Stock does supply it, and is in place thereof, and shall be in the same condition as the other Stock is; and therefore the Lessor shall have propertie in it. But the whole Court was against him: for they said, that the increase of the Stock of Sheepe should be to the Lessee, and the Lessor shall never have them at the end of the terme: but they agreed, that if the lease were of the Stock with Lambs, Calves, and Piggs, there the increase belongs to the Lessor. And all the Court took this difference, sc. when a lease is made of dead goods, and when of living; for when the lease is of dead goods, and any thing is added to them for reparations or otherwise, the Lessor shall have this addition at the end of the terme, because it belongs to the principle: but in case of a Stock of Cattle, which hath an increase, as Calves and Lambs, there these things are severed from the principle, and Lessor shall never have them, for then the Lessor shall have the Rent, and the Lessee shall have no profit.

Rot. 1454.

Trinit. 29 VVifeman against  
Rolfe. in in C. B.

**I**n a writ of right the Case was thus. A man leased of Land in Fee makes his will, and gives to D. his wife such Land for life, the remainder to T. his son and heirs of his body, and also gives to T. his son his Land in B. and also his Land in C. and also gives his Land called Odyum to the seed of his son habendum all the demised premises to his T. son and the heirs males of his body. The Question was if T. should have an estate in Tale in B. and C. or if the last words shall relate only to that which was last named.

Fenner for the Plaintiff. For the last Clause is a new Clause, and shall not be preferred to the first, for it begins with a verbe viz. I give my Land called Odyum, and therefore the limitation afterward shall be referred only to this. And to H. 7. 8. There was a grant by Dedi custer chamm Parc & Arbores vento prostrat. The Grantee shall have the trees by this Clause, and 14 Eliz. A man deviseth thus. I give my portions of C. to my second son; Item I give my portions of S. to my second son to have and to hold to him, and to his heirs. And by Dyer. Welch and Weston he had an estate but for life, but Brown cont. for if a Lease be made to A. B. and C. successively, it is adjudged that they are Jointenants, but if it be to them as they are named, they shall have it one after the other: and if a devise be to one and his heirs, and after to another for life, the Law will consider that the estate for life is to precede, for that words of Relation in Wills shall be taken strictly, as if a devise be to A. and his heirs of his body, and he does devise other land in Forma predicta, this shall be but for life.

Walshesley cont. and said that this limitation did go to all, whereof no limitation was made before, for the rules of reason are uncertain, and therefore such matters shall be expounded according to the best sense that may be, and here the sense is most naturall to refer it to all, and the word all imports this, and the Case of the fourth of Elizabeth (under favour) agrees with this viz. that the Devisee shall have Fee in both. But if the Devise had been, I devise D. to my son Thomas, and also to him and his heirs the portions of S. there he shall have D. but for life. And if a man devise to his 4. sons, A. B. C. and D. to have to the persons last named to them and the r heirs, there all shall have Fee. 19 Ed. 4. In a precept of a house and an acre of land in three severall Towns, and that the Defendant Ibidem ingressus est, and did not sap into the house and land, and yet it was held good.

Periam and Rhodes. He shall have an estate Tale in all, and the relation shall be to all. Anderson doubted at first, but agreed afterwards and Judgement was given accordingly.



Mathewson against  
Trott. in C. B. } Mulgrave against  
Agden, &c.

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32 & 33 Eliz. Mathewson against

Rot. 1904.

Trott. in C. B.

**U**pon a speciall verdict, the Case was this. A man sold of land in forrage devised it to his younger son, and died seised. The elder son enters and dies seised, and his heir enters, and the younger son enters upon him; the Question was, if his entry be taken away by this descent.

VValmesley. It is not, and he compar'd this case, to a title of entry for a condition broken, or a Conusee of a Fine upon grant and render &c. in which Cases no descent shall take away entry.

Anderson. The Devisee hath interest presently, and the land does not descend, for the devise prevents the descent, and the Freehold is presently in the Devisee, and the Statute 32 H. 8. which gives power to Devise lands, does make a Title in the Devisee as a Title of entry for condition of mortmain, and the Devisee shall not have an *ex gravi querela* upon this Statute, but he must enter.

Walmesley. The Devisee hath not a Freehold presently, for if it were so, the Devisee at the Common Law ought not to sue an *Ex gravi Querela*: but certainly if the freehold be in the Devisee, his entry is taken away. And afterwards Judgment was given by Anderson that descent does not take away the entry of the Devisee, but delivered no reason for it.

Hillar. 33 Eliz. Mosgrave against Agden.

Rot. 2529.

**I**n an action of the Case on a Trover and conversion of six barrels of Butter. The count was that they came to the hands of the Defendant, and after the trover they were impaired, and decayed, *ratione negligentis custodiae*. And the Court held clearly that the action would not lie, for he who finds goods is not bound to preserve them from putrefaction, but it was agreed, that if the goods were used, and by usage made worse, the action would lie.

44 Eliz. Ayer against Joyner, in C. B.

Rot. 2529.

**I**n a second Deliberance, it was said by the Court, that if Lessee for years does assign over his terme, and yet continues possession, that he hath but a naked possession, and no interest nor estate, but the estate and interest does remain in the grantee, so that he may grant it over.

And Walmesley said, that if the Lessee makes waste, the Lessor may have an action of waste against him: and there is a case, that if a man makes a Lease, and the Lessee wastes the possession, and a stranger commits waste, the Lessor shall have an action of waste against the Lessee, but the principall question was upon the pleading.

Taylor being Lessee for years, 9 Elizabeth did grant and assigne this to Ayer the Plaintiff. The Defendant pleaded, that before the grant made to Ayer i.e. 8 Elizabeth Taylor did grant and assigne his estate to the Defendant, without transferring the gift made to the Plaintiff.

Williams. There needs no traverse, for being granted the 8 Elizab. it is impossible it should be granted 9 Eliz. 2 Edw. 6. and 1 H. 3.

Anderson. The ought to traverse, for it is impossible to confesse and avoyd a grant by condition that was granted to another before, for if it were so, the second grant to boys, and to being so, confesse, here ought to be a traverse.

Walmesley cont. in 3 H. 6. it is sufficient to say, that at another day, &c. there was another arbitrement, &c. for by that the first arbitrement is voyd in Law. And it is a good plea in a Will, that after that, there was another will made, without traversing, and there is difference between Lands and Chattells: for land may be gotten out of a man by Injuring, and therefore it may be that after the testiment the feoffor entered and it disheised the feoffee, and did infeoffe another, but it cannot be so here of a terme for years, for no man can take it away from the Lessee by Injuring.

Glauvill and Kingmill cont. There must be a Traverse, for there ought to be a confession before there can be an avoydance, but here he does not confesse the grant, but pleads matter that denies it being granted. And at last Anderson gave Judgment that he ought to Traverse.

Rot. 135.

## 42 Eliz. Rudd, against Topley, in C. B.

**I**n a Quare Impedit. The Jury found that Edward Capell was seised of an Advowson in Fee, and did let it to the Defendant for years, and during the lease he presented the Defendant, and the doubt was whether this were a surrender or an Extinguishment. And it was held by all the Justices, that this could not be a Surrender, but is clearly an extinguishment: for if a man does present to his own Church as Prior to another, by this he looses his advowson, Nat. Br. 25. 17 Ed. 33. 24. H. 6.

Rot. 2480.

Hillar. 42 & 43 Eliz. Forrest  
against Ballard.

**A**n Audita querela was brought upon a Statute, which was acknowledged before a Justice, who had no power to take it.

Anderson. An Audita querela will not lie upon a voyd Statute.

But Kingmill, Walmesley and Warburton cont. and Walmesley cited Br. 102. where an Audita querela was brought upon a feoffor's Statute, and there it would lie upon a Statute made by Durels: 20 Ed. 3. 20.

Trinit.

Trinit. 40. Eliz. Goodrick against  
Cooper. in C. B.

Rot. 1379.

**I**n a Replevin the Defendant justified for Rent granted to the Master and Scholars of Emanuel College in Cambridge. And the Jury found, that one Spendlove being seised of the land where &c. by his Deed did grant to the said Master and Fellows, a Rent Ch. of 40 l. per annum for ever: and that Spendlove did lease his part of the Indenture, and delivered it to the use of the Master and Fellows to one J. S. to deliver it accordingly, but there was no deed to show their recit thereof: and then they sealed the other part but they made no Attorney to deliver it, and it was found that the Rent was paid for divers years after.

VValmley. Although no Letter of Attorney were made, yet it is good, for by their sealing of the Counterpart there is a sufficient agreement to the grant. As if a Reversion be granted to a Corporation by Deed, although they cannot accept of this, but by Attorney, yet if they bring a waste, this is a sufficient agreement to vest it in them. Quod alii Justitiani concesserunt, And judgment was given for the Plaintiff.

Michaelm. 43 & 44. Eliz. Claygate against  
Batchelor. in C. B.

Rot. 3272

**I**n debt upon a Bond of thirty pounds, the Condition was, that if Robert Batchelor, son to the Defendant, did use the Trade of Haberdasher as Journeyman servant, or Apprentice, or as a Master, within the County of Kent, within the Cities of Canterbury and Rochester, within four years after the date, that then, if he pay twenty pounds upon request, the Obligation to be void. And all the Justices agreed that the condition was against Law, and then all is void, for it is against the Liberty of a Free-man, and against the Statute of Magna Carta cap. 20. and is against the Commonwealth. 2 H. 5. & 5. And Anderson said, that he might as well bind himself, that he would not go to Church, And Judgment was given against the Plaintiff.

3. C. 10. 872.

Michaelm.



Rot. 674.

Michaelm. 43 & 44 Eliz. Dogget against  
Dowell. in C. B.

**I**n an action on the Case upon an Assumpfit, The Plaintiff declared, that at the request of the Defendant he had lent to him 30l. the 10<sup>th</sup> day of May y Eliz. and the Defendant in consideration thereof, viz. the second day of May aforesaid did promise and assume upon himself, that he at the end of the yeare would lend the Plaintiff other thirty pounds for a year, or give to him five pounds. It was said, that the consideration is good, for although the promise was made at another day, yet is it in pursuance thereof, so that in Law it shall be accounted all at one time, and is not like to the case in Dyer 372. where the Plaintiff promises one who was baile for his servant, that he would save him harmless, this is no consideration, for the Bailement was of his own will, and was executed before the Assumpfit, but if the Plaintiff had first requested, and afterwards assumed, there it is good; and so was it adjudged in the case of one Sydenham against Worthington, Trinit. 27 Eliz. Rot. 748. Where the request was before, and the promise after, and there it was a good Assumpfit.

VVarburton agreed. And it is like as if I should say to you, do such a thing, and I will give you five pounds, this is no good contract.

But all the Justices on the contrary; for when at the first day the Plaintiff did lend to the Defendant thirty pound that was absolute, and the speaking on the second day cannot have such reference to the first agreement, that it shall be accounted all one.

Anderson. If I say to one: In consideration you will serve me, for a year, I will give you five pounds, here is no cause of action, for the consideration is precedent and not mutual, and so judgment was entered for the Defendant.

Rot. 2529.

Hillar 41 Eliz. VVentworth  
against VVright.

**I**n a Quare impedit, two points were moved 1. If the Parson be made Bishop, whether the Patron should present or the King by his prerogative.

VVilliams. The King shall, for before the Statute the Pope should present, and the reason was, because the Bishop had received his presentment gratis from the Pope: and by the same reason, the King now shall present, for there is no reason the patron should, for by his precedent presentment he hath disinclined himself until resignation or death, as if a man lets land for another mans life, he shall not have the land during the life of Cestuy que vie, a great mischief would be, if it should not be so, for els all the presentments, that the King hath made, shall be usurpations.

The

The second matter was, that no presentment is pleaded against the King by the Patron, for it is pleaded that the Parson was admitted and instituted, but not that he was inducted (but the Court held it good notwithstanding that omission) But as to the first point, the Court asked Williams, if he could shew presidents that the King should have such presentment, for they said, that the usage by the Pope is no argument at all, for that he used to usurpe many things.

Walmesley, I conceive this custome began by the Popes usurpation, but he said, there is a Book in the time of Edw. 2. where this point is argued and adjudged, that the Patron shall present and not the King.

Williams shewed eight or nine Presidents in the time of H. 8. that the King used to present in such case, but all of them were between spiritual persons. And the Court said, they did not regard those presidents, for all spiritual persons were the Popes servants vid. 6 Elizab. 73. 8.

South against Whitewit.

**I**n a prohibition, the case was thus, the wife of VWhitevit had spoken scandalous words of South, and therefore she was excommunicated by the high Commissioners, and by Letters of the Pursebant came at twelve of the clock at night, and broke the house of VWhitevit and tooke the body of VWhitevits wife, who was rescued: wherefore VWhitevit her husband was called before the Commissioners, and hereupon VWhitevit prayed a prohibition. And the question was, if a Pursebant could break a house by such Commis- sion or not. And it was agreed, that by the Common Law, neither the Pope, nor any other spiritual Judge had any thing to do with the body and goods of any one, for only the sword spiritual belongs unto them.

VWalmesley: At the Common Law, after Excommunication a Capias Excommunicatum was awarded, and I conceive this writ is of force at this day, and is not taken away by the Statute of 5 Eliz.

Kingmill agreed, for this Statute gives power onely to correct the spiritual law, and to take away the authority of the Pope, but gives the same means to execute it as before, and he further said, that the Statute that did erect the Court of Wards, both appoint a Seale belonging to it, and other process according to the course of the Common Law: and therefore by the same reason, if this Statute of 5 Eliz. intended to give them such authority, they would have appointed a Seale also, and a course according to the Common Law, but as the course is here used, a man may be robb'd in his house by a beggerly Pursebant which is no Officer known by the Law. And so was the opinion of the Justices,

Pasch. 40 Eliz. Goosey against  
Pot., in C. B.

**I**n a Replevin the Case was thus; two Hundreds were adjoining together to two several Mannours of two several persons, and the abbot was seized of one of them, and he prescribed that all the Tenants of the other Hundred have used to make suit to the Leet within his Hundred; and also that the Lord of the other Hundred used to appear, or to pay him 4 s. pro anno futuro; and if it were not paid, the Defendant prescribed, that he and all those, whose estates he hath, have used to distress any Inhabitant within the Hundred for the same; and therefore for 4 s. not paid, he did abate the Distress within the Mannour of the Plaintiff, who was one of the Inhabitants.

Williams. A man may prescribe by a que estate in a Hundred, for a man may have it by disseisin, and there are divers presidents which the Prothonotaries have shewed me to warrant this in a Replevin, for the seisin is the matter of the title. And to this Littletons rule may be added, that of all things which lye in grant, and whereof a man cannot be disseised against his will, a man shall not plead a que estate.

Kingimill. A que estate cannot be pleaded of a Hundred, unless it be appendant to the Mannour; and a second matter was moved in this Case, viz. that he prescribed to distress the Cattle of a stranger for the essence of the Debt.

Williams. It is not good, by the 41 Ed. 3. but by the 47 Ed. 3. for suit and service, the Cattle of the Lord may be distressed on any land within the Hundred.

Anderton. I do agree to the Case of my Lord Dyer, that the Cattle of a stranger cannot be taken for a Herriot.

Walmesley. In the 13 of H. 7. it is said by Fincux, that a Lord of a Mannour may enlarge his services by prescription, and so the Cattle of a stranger may be taken: but for a personal matter, as for amercement in default of suit, no stranger may be distressed. And afterwards agreed by all the Justices, that the Strangers Cattle could not be distressed.

### Holt against Lister.

**I**n a Replevin the Case was thus, he in the reversion after Tenant in Dower, grants it over to the use of himself for life, the remainder to his next son in Tail, the remainder to the use of himself in Fee, and after this he leveys a Fine to the Plaintiff and his heirs of land which he claimeth de heretate sua, after the death of the Tenant in Dower. The Plaintiff brought a Quid Juris clamor against the Tenant in Dower, and upon non sum informatus, Judgment was given that the Tenant should attorn, and now he prayed that she should not attorn, for if she attorns, she will forfeit her estate. Walmesley. If he in the remainder for life grants over by Fine, it is no forfeiture, for he gives no more right than he hath; and so hath it been adjudged in the time of my Lord Dyer.

Glanvill.



Glanvill. I agree to that: but in this Case he grants that which he hath de hereditate sua; and this recital will make a fozfeiture; and then if the Tenant in Dower attorn, this is a fozfeiture.

Anderfon. This attornment is no fozfeiture, because it is by judgement of the Court.

Walmesley. I agree, for the Grant it self is no fozfeiture, unless it be by reason of the recital, but the Attornment shall have relation onely to the substance of the Grant. And it was much disputed between Walmesley and Glanvill, If Lessee for life of a Rent grants this in Fee by Fine, if this be a fozfeiture, and Walmesley vouched a Judgement, that it was no fozfeiture; and Glanvill voucht 11 Ed. 3. Grant 60. to the contrary, and 15 Ed. 4. 9. by Littleton. If Lessee for life of a Rent grants this by Fine in Fee it is a fozfeiture, by reason of the Estoppel, otherwise if it were by Deed. Vid. 1 H. 7. 12.

Mich. 32 & 33 Eliz. Marshes Case,  
in B. R.

Rot. 1011.

**M**Arsh and his wife brought a Writ of Error as Executors to Nicholson to reverse an Outlawry upon an Judgement of Felony pronounc'd against the Testator.

Altham of Grays-Inne. The sole point was, whether the Executors may have a Writ of Error, and I hold that they may; for if there be no heir, it is great reason that the Executors should have it, for otherwise the erroneous judgement cannot be at all reversed; and every one shall have a Writ of Error that is damaged by the erroneous judgement, and Executors have right to the personal estate to have Error: For if a man recovers damages in a Writ of Co-senage, and the land also, and dyes, his heir shall have Execution for the land, and the Executors Execution for the damages, by the 19 Ed. 4. 5. 43 Ed. 3. 13 Ed. 4. 2. If a man does recover my villain by a false Verdict, the heir shall have an attainr for the villain, and the Executors for the damages, and a Writ of Error shall be given to him to whom the right of the thing lost both descend, as it was adjudged in the Case of Sir Arthur Henningham, and he cited two presidents in the point, 1 Trinity, 11 H. 8. Rot. 3. where an Administrator brought a Writ of Error to reverse a Judgement given in an exigent. Vid. 2 Rep. 41. 2.

Cook contr. In Natura Brevium, 21 M. he says, an Executor shall have a Writ of Error upon a Judgement given in Debt against the Testator, and the heir shall have Error to reverse Outlawry in Felony, and to restore him in his blood; and he said that it was part of the punishment in Felony to have the blood corrupted, & sic filius portat iniquitatem patris; and by reason of the attainder, he cannot inherit any Ancestors; wherefore he having the damage, it is reason that he should reverse it. And although Executors shall have a Writ of Error for Chattels personal, yet they shall not have one when they are mixt with things real, 5 H. 7. 15. 18 Ed. 4. If Writings be in a Wor, the heir shall have the Wor, because real things are more regarded than personal.

Nevertheless in this Case the Writ of Error is in a real Action, for the Law says, that it is in the same nature as in original action, whereupon it is brought; as if Error be brought to reverse a Judgement given in a personal action, the Writ of Error is personal; and so in like manner is it real, if the first action be real, 47 Ed. 3. 39. 33 H. 6. 19, & 23. and although the first action be mist, yet the Law does rather respect the reality, 30 H. 6. Barr. 59. where two brought an assize, and one did release, and there it was said, that although this were a mist action, yet it shall be according to the truth, both, and that is the reality: and 16 Ass. 14. where Distessors being barr'd in an assize, did bring a Writ of attainr for the damages, and summons and severance was suffered, so damages were joyned with the reality: and Sanford, 184. If a man be indicted before a Coroner, quod fugam fecit, if he after reverse the Indictment, yet he shall have his goods, for de minimis non curat Lex: But note, that the Justices said; that the fugam fecit was the cause of forfeiture of the goods, and not the Felony. And as to the presidents, he agreed to the Case of the 18 H. 7. for an Executoz shall have a Writ of Error to reverse Judgement given in an exigent, for there nothing but the goods are forfeit, 30 H. 6. Forfeiture 31. and for the president in 11 H. 8. it cannot be proved that the Outlawry was for Felony. Vid. Rep. fol. 3.

Rot. 467.

33 Eliz.

Lilly against Taylor;  
in B. R.

3 (20313.

**M**arsh seized of the land in question, did devise this to Rose Lilly for life; and if she should marry, and after her decease should have any heirs of her body lawfully begotten, then that heirs should have the land, and the heirs of the body of such heir; and for default of such issue, the land shall revert to Philip Marsh, his son and his heirs, and the question was, if the husband of Rose shall be Tenant by the curtesy, or not; and so if Rose had estate Tail, or for life only.

Bend. 30.

1 And. 43.

Godfrey. She hath estate but for life; and he cited a Case adjudged in Benlowes Reports, 40 Eliz. where lands are devised to A for life, and after his decease to the male children of his body, and it was adjudged that the male children have an estate Tail by purchase, and nothing by descent, and so A had nothing but for life.

Gawdy agreed, for she hath but for life, and when she dies, her issue shall have it.

Popham agreed, if the words were, that if she had issue, that he should have it.

But Clench held, that she had an estate in Tail executed, and that her husband shall be Tenant by the curtesy.

Fenner. The issue is a Purchaser, for the Debtor intended that Rose should not have a greater estate than for life. And also it was agreed by all the Justices, that a Devise to a man and his heir shall be accounted a Fee Simple, for that the word, heir, is collective; and so is the 29 Ass. where land was given to a man, and to the heir of his body,

Bolton against Sir Henry Dimmocks Case  
Bolton. in the Court of Wards.

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body, & uno heredi ejusdem heredis, this is an estate Tailor  
Popham. He shall be Tenant by the curtesy; and bargain, that  
heir of the body was a good name of purchase; but if a frank-ten-  
ment be limited to his Ancestors, and by the same Deed it is also li-  
mited to his heir, the heir shall be in by descent. But Fenner on the  
contrary.

Shillings 50 more.

Pasch. 38 Eliz. Bolton against Bolton,

Rot. 882. 2  
582. 1

**T**enant for life being impleaded, both pray in aid of him in  
the Reversion, who join and lose, &c. and the Tenant for  
life brings a Writ of Error; and the Record is removed,  
and he in the remainder brings a Writ of Error also. De  
Recordo quod coram vobis residet; and the question was, upon which  
Writ of Error the Judgement should be reversed: and it was objected,  
that if it should be reversed by the Tenant for life, that he in the remain-  
der should be restored.

But Gawdy, Fenner, and Clench contr. Who held, that it should  
be reversed at his suit who first brings the Writ, as in case of Inter-  
pleader, it shall be alwayes upon the first Writ. And notwithstanding  
the removing of the Record by the Tenant for life at the next term,  
the Court said, it was at their discretion to reverse this at suit of any  
of the parties, as they pleased: and because they observed some in-  
direct practices by him in the remainder, it was reversed at suit of Te-  
nant for life.

Pasch. 5 Jacob. Sir Henry Dimmocks Case,  
in the Court of Wards.

**T**enant of the King by Knights service, bargains and sells his land  
to Sir Henry Dimmock and his heirs. and Sir Henry Dimmock  
dyes, his heir within age, and then the Deed is enrolled; the question  
was, if the King should have premier seisin.

Trist. The King shall not, because Sir Henry did not dye within  
his homage, but the land was in the Bargainor; as if there be a Bar-  
gainor of the reversion, and the Tenant makes waste, the Bargainor  
shall not have waste, unless the Deed be enrolled before the waste  
committed, 3 Jacobi. Bellingham against Allop. Bargainor before  
enrolment sells the land over, and it was adjudged that the second bar-  
gain was void, 10 Eliz. Mockets case. Disseisor released to the Bar-  
gainor of the Disseisor before enrolment, and adjudged void, 5 Eliz. in  
Pophams Case it was said, that the Statute of enrolments had altered  
the Common Law; for now by the holding of the Deed, no use is  
called until it be enrolled. But all the Justices held, that the Deed  
should



should be in Ward, and pray premier seisin if he were of full age; for the Statute saies, that no use shall be, unless the Deed be enrolled; but if it be enrolled, it passeth ab initio; and then the Bargaineer shall be Tenant ab initio. But it was also agreed by all the Justices, that the wife of Sir Henry shall not be endowed, and that Rent paid to the Bargaineer at the Rent-day incur'd after the bargain is good, and the Bargaineer hath no remedy, because it is a thing executed.

Rot. 924.

Trinit. 12 Jacobi. Cuddington against  
Vvilkin, in C. B.

**I**s an Action of the Case for calling the Plaintiff Thief, the Defendant justified, because the Plaintiff had stolen Sheep, 37 Eliz. the Plaintiff replied proterando, that he had not stolen Sheep, and pleaded the General Pardon, 7 Jacobi. upon which the Defendant demurred, and adjudged for the Plaintiff, for the Pardon had so purged and abolished the Offence, that now he was no Thief, 1 Ed. 3. Corone 15. 2 Ed. 3. Corone 81. 1 Affi. 3. So if one call another Villain after he is enfranchised. And in one Baxters Case, in Banco Regis, it was adjudged, that where a man was accused for Perjury, and acquitted by Trial, if he be afterwards called perjurd, he shall have his Action on the Case. And Judgement was given for the Plaintiff.

## Seaman against Cuppledick.

**I**s a Trespass of Assault and Battery, the Defendant justified in defence of his servant, scil. that the Plaintiff had assaulted his servant, and would have beaten him, &c. and the Plaintiff demurred.

Ylverton. The bar is good, for the master may defend his servant, or otherwile he may lose his service, 19 H. 6. 60. 2.

Crook Justice. The Lord may justify in defence of his villain, for he is his inheritance.

Williams contr. The master cannot justify, but the servant may justify in defence of his master, for he owes duty to his master, 9 Ed. 4. 48.

Ylverton. The master may maintain a plea personal for his servant, 21 H. 7. and shall have an Action for beating his servant; and also a man may justify in defence of his cattle.

Cook. A man may use force in defence of his goods, if another will take them; and so if a man will strike your cattle, you may justify in defence of them; and so a man may defend his son or servant, but he cannot break the peace for them: but if another does assault the servant,

servant, the master may defend him and strike the other, if he will not let him alone.

Williams. It hath been adjudged in Banhams Case, that a man cannot justifie a batterie in Defence of his self, a fortiori he cannot in defence of his servant. vid. 19 H. 6. 31. 9 Ed. 4. 48.

Trinit. 12. Jacob. Drury against  
VWaller.

I An action on the Case upon a trover and conversion of 200 l. delivered by the Plaintiff to the Defendant; and upon not guilty pleaded, the Question was, if deniall by the Defendant to pay it upon request, would beare this action. And the case of Isaac was urged, who brought an action of Trover, &c. for 200 l. in a bag, and by verdict it was found that demand was made thereof, and a deniall to pay it. And by Dodderidge it was a Conversion.

Crooke accozded, but Haughton doubted the case. And Man Wythonorarie said, that he remembered a president in the Case, where it was resolved, that in such case deniall of a horse was a conversion.

Haughton. I remember an action of Trover was brought for a Trunk, and it was ruled there, that if one hath Timber in my land, and he demands liberty, to carry it off my Land, and I deny it, this is not a sufficient conversion.

Dodridge, there is great difference in the Cases, for a Horse or money cannot be known, if they be used, but Timber may. Et adjourn.

Michaelm. 8 Jacobi. Alfo and Dennis against  
Henning. in B. R.

Rot. 969.

I An action of Covenant, the Case was thus. Thomas Taverner by Indenture primo Jacobi, did demise land to one Salisburie for 7. years: and by the same Indenture Salisburie did Covenant, grant, consecrate and agree with Taverner his heirs and assignes, that he, his Executors and Administrators should pay to Taverner his heirs and assignes 75 l. per annum. And after Taverner demise the same land, to Mary Taverner for life, and he demise the reversion for 40. years to the Plaintiff, if he so long lived, and the tenant attorned, and so rent due at the Feast of St. Michael he brought his action of Covenant. And the first question was, if this were a sum in gross, because the Lessee covenanted to pay this as a Rent. And resolved by Cook Chief Justice, and the Court, that this is a good reservation of Rent, for it is by Indenture, and their intention was to have it as a Rent, and the words of the Indenture shall be accounted to be his, who may most properly speak them. 26 H. 8. 2. 10 Eliz. 275. 22 H. 6. 58. 28 H. 8. 6. And the Case between  
Whitchert

Whitchett and Fox in Replevin this terme, where a man made a Lease for 99. years rendering rent, and the Lessee covenanted by the same deed with the Lessor, that he would not alien without his assent upon paine of forfeiture, and after he aliened, and the Lessor entered. And it was held by the Court that this was a condition, although the Plaintiff did covenant: for being by Indenture, they shall be the words of both, and the words *sub pena forisfactura* are the words of the Lessor. The second point was, if the assignee for 40 years, may have a Covenant, and it was held he might, for it is for payment of rent, and if the Lessee covenants to do any thing upon the land, as to build or repaire a house, there a covenant will lie for the assignee, by the common Law, but if it do not by the Common Law, yet it is cleere that it will lie by the Statute of the 3. H. 8. And the Court held, that an Assignee of part of the reversion might take advantage of the condition or covenants, so that he hath part of the reversion of all the thing demised. And Cook, Chief Justice said, that the opinion of Mourion 14 Eliz. 309. is good Law.

Pasch. 36 Eliz. Butler against  
Archer.

If two Joynttenants be of land holden by Herriot service, and one dies, the other shall not pay Herriot service, for there is no change of the tenant, but the survivor continues tenant of the whole land. But if a man seised of land in Fee, makes a feoffment to the use of himself and his wife, and the heires of their two bodies begotten, the remainder to the right heires of the husband, and the husband dyes, a Herriot shall be paid, for the ancient use of the reversion was never out of the husband.

Michaelm. 29 & 30 Elizab. Stephens  
Case. in C. B.

In an Ejectment, the Case was. Sir William Beale made a Lease by Indenture to William Pile and Philip his wife, et primogenito proli Habendum to them and the longer liver of them successively during their lives, and then the husband and wife had issue a daughter. And it was holden by three of the Justices, that the daughter had no estate, for that she was not in esse, at the time of the grant.

Michaelm.



Lewin against Mandy. in C. B. } { Oldfield against Wil-  
more. in C. B.

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Michaelm. 30 & 31. Eliz. Lewin against  
Mandy. in C. B.

Rot. 3529.

**I**ſſe a Replevin the Defendant avowed for 20 l. Rent, which was  
pleaded to be granted by Lovelace and Rut and by fine to Skuke-  
ley and his heirs, who being seized thereof, did recite that he  
with 7 others were plaintiffs in a Writ of Covenant against Love-  
lace and Rutland, upon which a fine was levied, by which fine the  
said Lovelace and Rutland amongst other things, did grant a rent of  
20 l. out of the Mannor of D. and other Lands to the said Skukely, who  
granted it to Loveden, under whom the Defendant claimes in Title.  
The Question was if this were a good grant, because, there are many  
infractalls in the Indenture: for whereas he recited that in the Writ of  
Covenant for the fine Lovelace and Rutland were Defendants, in truth  
they were Plaintiffs, and Skukely and the others Defendants, and  
whereas he recited that the said grant was made to him, it was made to  
him and his heirs, also he said, that the said Rent Charge amongst  
other things was granted, whereas nothing but the 20 l. Rent was  
granted, and that only out of the Mannor of D. and not out of other  
Lands.

ankra 41.

Anderſon. If a man recites that he hath a Rent of 10 l. of the grant  
of J. S. whereas he hath this of the grant of J. D. yet is the grant good,  
And at last it was adjudged that the grant was good.

Note that Penner at this time said, that it had been resolved by An-  
derſon and Gawdy and other Juſtices very lately, That if the Kings  
Tenant dies, his heir within age, yet the heir at full age before liberty  
ſued may bargain and ſell by Deed inrolled, or make a Lease for years  
and it is good: but if he makes a ſeignment or leaſe a fine ſur conſeance  
de droit come ceo, &c. this is void, because it cannot be without in-  
ſtrution upon the King.

Trinit. 39. Eliz. Oldfield against  
WVilmore. in C. B.

Rot. 3715.

**I**ſſe Debt upon a Bond to performe the award of J. S. who his award  
that the Defendant should pay 10 l. or cause two strangers to be  
bound for the payment thereof, the Defendant pleaded performance,  
the Plaintiff replied that he had not payed the money, and the De-  
fendant demurred.

Walmesley for the Plaintiff. For although the award be in the disjunc-  
tive, yet forasmuch as it is void as to one part, now upon the matter  
it is single, and on the non payment of the ten pounds is forfeit 17 Ed.  
4. 5.

Windham and Rhodes, held that the Plaintiff should have pleaded  
that he was of the award as to 10 l. it is a thing intire, and the Law will  
adjudg

## Goodridge against Warburton.

adjudge that one is only to be done, because the other is contrary to the Law.

Anderfon and Peryam. The plea is good, for a man shall not be compelled to shew a boyd matter, and although the Defendant had caused the two strangers to be bound, the obligation is broken, for as to this arbitrement, it is merely boyd, and at another day the Plaintiff had judgment.

## Goodridge against Warburton.

**I**s an Assentment. The Jury gave a speciall verdict, that Francis was seised of the land in Tale, and suffered a Recovery to the use of him and his heirs, and afterwards did devise the same lands to his wife Margery untill his daughter Prudence came to the age of 19. years, and then that Prudence should have the Land to her and the heirs of her body, upon condition to pay twelve pound per annum to the said Margaret during her life in recompence of her dower, and if she failed of payment, then Margaret should enter, and hold the Land during her life, and afterwards, it shall go to Prudence as before. And after this John Francis the wife did reverse this recovery, by a Writ of Error, and entered upon Margaret, and she brought her Writ of Dower, and was endowed of the third part, and then she leaseth a fine of that third part to the late John Francis, and he intested Tyndall, who made the Lease to Goldsing, and then Margaret married Warburton, and Prudence came to the age of 19. years, the Rent of twelve pound is not paid, and Warburton and his wife entered, and Goldsing brought this action.

V Valmesley. By the recovery of the third part in the Writ of Dower, the Rent of twelve pound, which was in recompence thereof is gone. For at the Common Law, if a woman recover in Dower, she hath waived that which was assigned to her in lieu of her Dower, as in case of Dower ad ostium Ecclesie, and 10 Edw. 4. If the husband continues the Land of his wife, and she brings a Writ of Dower, she is concluded to have a Cui in vita.

Shuttleworth cont. By this recovery the estate taile is revived, yet as this case it is so, not materiall, for because he entered without a suit, he is a Disseisor, and that was agreed by all at the Bar and the Bench. And he cited 16 H. 8. 3<sup>d</sup>. 4<sup>th</sup> H. 7. 11. And I conceive that the Dower will not conclude her of the twelve pound per annum, for it is not a Rent, and the title to have the Land for her Joynture, for non-payment the Rent was not in esse at the time of the recovery of her Dower, but afterwards, as if a Lease he made to a woman who marries the Lessor, who dies within the terms, and the wife enters, this shall not conclude her Dower, after the Lease is expired by the eleventh of H. 4. Also the twelve pound is not appointed to be issuing out of the Land, and so it cannot be a Joynture, and therefore, the wife is at large to have the twelve pound, and her Dower also. But the Court held, that she could not have her joynture, for by the recovery of the Dower her joynture is barred, for the Rent was given her in recompence of her Dower, so that it cannot be intended that she shall have Rent and Dower also, wherefore it was adjudged that her entry on the Land was not good.

30 & 31 Eliz. The King against the Bishop of Canterbury and Hudson.

Rot. 1832.

**I**n a Quare impedit, Hudson the Incumbent did plead, that King Edw. the 4<sup>th</sup> did grant the Rape of Hastings, Et bona & catalla Fellonum Fugitivorum & ategar of all Residents and non-residents within the said Rape to the Earl of Huntington. And pleaded that John Ashborne was seized of the Mannor of Ashborne, and of the advowson appending to it, and held the same of the Earl of Huntington as of his Rape of Hastings, and that the said John Ashborne was outlawed, during which, the Incumbent of the said Church dyed, and the Earl presented the said Hudson.

Shut. I conceive this advowance does not belong to the Earl, by reason of this grant, for by the same Patent libertie is given to the said Earl & his heirs to put himself into possession, and of such things as he cannot put himself into possession, they will not passe, and here this is a thing in action, which by these words will not passe. 19 H. 6. 42. by the grant, de Catalla Fellonum obligations do not passe.

VValmesley, Stanford in his prerogative, saith, that by the words, Bona & catalla the King shall have the presentation to the Church of him that is outlawed or Attaint, and by the same reason he may grant it by such a name, and although the party cannot seise such a thing, yet it shall passe 39 H. 3. 35. Rent for years shall passe by the grant of bona & Catalla.

Periam. It will passe by these words, for it is an ancient grant, for in that time the Patents, of the King were not so specially penned, as now they are.

Anderson. I conceive the advowance will not passe by these words, for within this word bona moveables are contained both dead and living, and Advowance is no Chattell nor right of Chattell, Quod Peryam negavit, &c.

Mich. 37 & 38 Eliz. Townsend against VVhales.

**I**n an Execment, the Jury found that J. S. was seized of land in possession, and also in reversion for terme of life, and made a Deed by these words, That his Executors take the profit of all his Lands and tenements Free and Cope, for ten years for the payment of his debts, and Legacies, and after the end of the said ten years, that all the aforesaid lands and tenements with their appurtenances, should be sold by his Executors or one of them, and the silder to be bestowed in the performance of his Will, or by the Executors of his Executors, or any of them, and then one of the Executors dyed within the ten years, and the two surviving Executors did grant all, aswell in possession as in reversion to Houle, who made a Lease to the Plaintiff. And two points were resolved,



## The Earle of Rutlands Case.

1. That the Executors may grant the reversion (34 H. 6.) so by these words (Free and Copy) his intent appears, that all should be granted.

2. That although one of the Executors died, yet the other two Executors may sell.

Anderlon. If such debts had been at the Common Law, and one Executor had refused, the two others could not sell, but if one die, the survivors may sell the land, so there the authority doth survive. Which difference the other Justices agreed so. And at another day Anderlon said, there was difference, where the Debit is, that Executors should sell his and the money divided between them, there if one die, the others shall not sell, but otherwise here, because the money is the performance of his will.

Walmesley, The sale by the two Executors is good, so it is said; the Executors or any of them, &c. And Beaumont agreed, Wherefore judgment was given so the Plaintiff. Note that there were two verdicts in this case, and the first only found, that the Executors should sell after the ten years, and that one dyed, and the other two did sell within the ten years, and the opinion of the Court was that the sale was good, but in the 39 and 40 Eliz. all the whole will was found and Judgment given ut supra.

## The Earle of Rutlands Case.

**R**oger Earl of Rutland, and John Maners and others Executors to John late Earl of Rutland Executor to Edward Earl of Rutland, brought an action on the case against Liabell Countess of Rutland, And Declared so divers Jewells and goods, &c. that came to the hands of John Earl of Rutland as Executor to the said Edward, and the said John the 10<sup>th</sup> of July 29 Eliz. did casually loose them, which after came to the hands of the Defendant, & licet sapius requisita, she would not deliver them to the said John in his life time, nor to the said Plaintiffs after his death, but knowing the goods did belong to the Plaintiffs in D. in the County of Nottingham converted them to her proper use. And a verdict so the Plaintiff. And it was moved often in arrest of Judgment, but all the Justices agreed, that the action of Trover and conversion would lie by the Executors upon the Statute of the 4 Ed. 3. upon a conversion in vita Testatoris, and so hath it been adjudged in the Kings Bench, and although the Statute mentions onely a Writ of trespass, that is only put so example. Also they all agreed, that the sole cause of action is the Conversion, so if there were no conversion, they shall be put to their Detinue, therefore the great doubt did arise, because the day and time of the conversion was not shewed, so perhaps it was after the Writ and before the Declaration: And also if it was in vita Testatoris they should have this action by the 4<sup>th</sup> of Ed. 3. But at length Walmesley said, That all Justices of the Common Pleas, and of Serjeants Inne in Fleet-street (besides Peryam Chief Baron) were of opinion that Judgment should be given so the Plaintiffs, so that some of them held, that the day of the Conversion is not materiall to be shewn, and others, that of necessity as this case is, it shall be intended that the conversion was in the Plaintiffs time, wherefore Judgment was entered so the Plaintiffs, but a Writ of Error was brought, and the Case much debated.

Mich-

Michaelm. 38 & 39 Eliz. Carew against  
Warren. in C. B.

Rot. 1945.

**G**unter Tenant in Tale of Lands in ancient Demesne made a Lease for 60. years to J. S. and for security thereof letted a fine to Lee and Loveland, who removed to Gunter in fee, who devised the reversion to his wife for life the remainder in fee and dyed. And then the Lord of Andover, (which is an ancient spanno) by an *Ostensum est nobis*, returned in the Common Bench against Lee and Loveland, upon a scire Facias awarded against them. and two *Nihilis* return'd, the fine was reversed.

Anderlon. The scire Facias is not well awarded, for it ought to be brought as well against those in possession, as the Comors, and this appears by the 21 Ed. 3. 56. by which they in possession and those in remainder ought to be made party.

Walmesley agreed, for the Freehold, which is in me shall not be taken from me without making me party, no lesse, then if A. bring a Precipe against B. of my land and recover, for I shall have an Assise upon this. Also another matter is in the Case. For the land now in question is alleged to be parcell of the spanno of Andover, and therefore cannot be ancient Demesne. But no Judgment was at this time given, because there were but two Justices.

### Halling against Comand.

**I**n an action of Covenant, the case was thus. Comand the Defendant did covenant with the Plaintiff, that at the Costs and charges of the Plaintiff he would assure certaine land for the Joynture of the Plaintiffs wife before Michaelmas. And the Plaintiff declared that no assurance was made, nor tender before the said Michaelmas. And hereupon the Defendant demurred, for that the charges should have been offered before the assurance, 3 H. 74. 23 Eliz. Dyer. Anderlon in the 35 & 36 Eliz. Foster did covenant with Franke to make an assurance at the costs and charges of Franke, and Franke brought a Covenant, and Foster demurred because no charges were tendered to him, & it was adjudged against Foster, for Franke could not have cognizance what manner of assurance should be made, and so could not tell what charges to tender, and therefore he ought first to shew him what manner of assurance he should make, and according to that he ought to tender reasonable Charges.

Walmesley. But the charges ought to precede the assurance, but the declaring of what manner of assurance should be made ought first to be done. Beaumont of the same opinion.

Michaelm. 38 Eliz. Dampont  
against Symphon.

**I**n an action on the Case, the Plaintiff declared that he had given to one Spilman certain Jewells to Traffique with them beyond the Seas, and that he had not sold them, but had delivered them to the Defendant, who had sold them, whereupon the Plaintiff brought an action against the said Spilman, and upon not guilty pleaded they were at issue: and the now Defendant at that evidence did Depose upon his oath, that the Jewells were worth but 200 l. whereas they were worth 800 l. by reason whereof the Jury gave indeed but 200 l. damages, and for this false oath he brought this action: and the Jury upon not guilty pleaded, found for the Plaintiff, and assessed 300 l. damages. And now it was moved in arrest of Judgment that the action would not lie, no more than against those informers a Justice of Peace of Felony upon his oath against J. S. 20 H. 7. 11. Also the party grieved hath his remedy in the Star Chamber. And Walmesley said that for perjury there was no remedy, and so is it in the 7<sup>th</sup> Eliza. Dyer 243. 2. for it is not to be thought that a Christian would be perjur'd, and in the 2<sup>d</sup> H. 6. 5. a Conspiracy will not lye against Informers, who informe their company of their oath. Wherefore, It was adjudg'd that this action did not lie. Note that Anderson was against this Judgment: but Walmesley Owen and Beaumont were against him,

F I N I S.





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